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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 638

HIRAM STEELMAN, TRUSTEE IN BANKRUPTCY OF WILLIAM FOX, A BANKRUPT, PETITIONER,

vs.

ALL CONTINENT CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 11, 1937.

CERTIORARI GRANTED FEBRUARY 15, 1937.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

No. 24,431

In the Matter of William Fox, Bankrupt

Docket Entries

1936.

May 29. Petition & Schedules filed 9:15 A. M. at Camden, N. J. Adjudication.
Order of reference to Robert E. Steedle, Atlantic City, Referee.
Petition & rule to show Cause re restraint.

July 2. Order apptg. Hiram Steelman, Atl. City, Trustee (6-25-36) Trustee's Bond.
Order Approving Trustee's Bond.

7. Order continuing rule & restraint to Sept. 11/36.
Affidavit of Samuel B. Stewart, Jr., in opposition to Pet. for stay.
Affidavit of Geo. Frankenthaler, appearing Specially to contest the Jurisdiction of the Court.

8. Pet. & Order of Restraint.

Aug. 27. Certificate of Referee on Petition for Review.

[fol. 2]

Sept. 4. Petition for stay.
Order allowing stay of Referee's order.

9. Referee's Certificate for Contempt.
Testimony (2 books).

11. Affidavit of George Frankenthaler.
Affidavit of Sam'l B. Stewart, Jr., in opposition to Petition for stay.

14. Petition & Rule to show cause re contempt of Eva Fox.

15. Supplemental Affidavit in support and Rule to show cause.

22. Minutes.
Petition for Restraint.
Affidavit of Service.
" " Eva Fox.
Order To show cause re restraint.

DOCKET ENTRIES—Continued

1936.

Sept. 25. Creditors' Petition for Examination of Witnesses.
Order for Examination of Witnesses.
Proof of Service.
Notice to Dismiss Trustee's Petition for Stay.
Order re restraint.

Oct. 2. Memorandum (Avis).
" "
7. Order To Restrain.
9. Notice of Application to settle form of Order of Affirmance.
Order of Affirmance.
Proof of Service of Order of restraint.
15. Assignment of Errors.
Petition on Appeal of All Continent Corporation, a corp., & Eva Fox.
Order allowing appeal of All Continent Corporation, a corp., & Eva Fox & Supersedeas.

[fol. 3]

Bond.
Citation issued.
20. Assignment of Error on appeal by All Continent Corp.
Petition of All Continent Corp. for an appeal from final order & decree restraining All Continent Corp. from prosecuting an action in the U. S. District Court for the Eastern Dist. of Penn'a against the Trustee in Bankruptcy.
Bond for Costs on Appeal of All Continent Corp.
Citation issued.
21. Præcipe for Printing Record.

IN UNITED STATES DISTRICT COURT

2. PETITION

To the Honorable, the Judges of the United States District Court, for the District of New Jersey:

The petition of Hiram Steelman, Trustee in Bankruptcy for William Fox, bankrupt, respectfully shows:

1. That William Fox, the above named bankrupt, was adjudicated a bankrupt by order of this Court on May 29, 1936.

2. Thereafter, on June 25, 1936, Hiram Steelman, petitioner herein, was appointed trustee of said bankrupt and his estate by Honorable Robert E. Steedle, Referee in Bankruptcy, to whom this matter was referred, and said petitioner promptly thereafter duly qualified as such Trustee and thereby became entitled to receive into his possession all of the assets of said bankrupt.

[fol. 4] 3. That thereafter upon the petition of the Capital Company and Chicago Title and Trust Company, two of the creditors of said bankrupt, it was ordered that All Continent Corporation, a corporation of the State of Delaware, Eva Fox, the wife of the bankrupt, Belle Fox and Mona Fox, both daughters of the bankrupt, Herbert Leitstein and Joseph Hart should be examined under Section 21-a of the Bankruptcy Act of 1898. Said order directing said examination was entered herein on June 23, 1936.

4. In pursuance of said order directing said examination subpœnas were issued out of this Court directing all of said parties named in said order to appear before the aforesaid Referee for examination and requiring them to produce certain books and records. All of said subpœnas were duly served upon said parties.

5. Said examination by virtue of said order began on July 6, 1936, and has continued to be conducted on the following dates, to wit: July 6, 7, 8, 9, 14, 15, 16, 21, 22, 23, 28, 29, 30, August 4, 5, 6, 12, 18, 19, 20, 25, 26, September 1 and 2, 1936.

6. Said petitioner as Trustee in bankruptcy for the above named bankrupt is charged with the duty and obligation of discovering and acquiring possession of all of the property and assets of said bankrupt, and in pursuance of his duty and obligation in that respect he is interested in the progress of said examination and any benefit that might result therefrom. He has been personally present during most of the time that examination of witnesses has taken place by virtue of the aforesaid order, and at times when petitioner has not been present at said examinations, he

[fol. 5] has been represented at said examinations by his attorney duly appointed.

7. The aforesaid examination is being conducted for the purpose of inquiring into the acts, conduct and property of the bankrupt. Said examination has not been completed. For the most part said examination has been conducted for the purpose of inquiring into the acts and conduct of the bankrupt in connection with numerous transactions which said bankrupt had with said All Continent Corporation.

8. As a result of information and facts which came to the petitioner herein as result of disclosures made during said examination, petitioner herein made application to said Referee in Bankruptcy to compel All Continent Corporation to turn over its books and records to petitioner herein, as Trustee for said bankrupt, for complete examination and audit for the purpose of ascertaining such information as is therein contained respecting the acts, conduct and property of the bankrupt. As a result of said proceedings had before said referee, he, the said referee, filed conclusions herein in which the facts and circumstances respecting the transactions which had theretofore taken place between said All Continent Corporation and said bankrupt were summarized as follows:

"The All Continent Corporation, whose books and records are here sought to be examined, was the creation of the bankrupt himself; every dollar of its capital came from the bankrupt; by the formation of the corporation, he divested himself of a very substantial portion of his property; all of its capital stock, now allegedly owned by the wife of the bankrupt, has never been transferred upon the [fol. 6] books of the corporation, and the bankrupt still appears as the record holder thereof; from the time of the formation of the corporation, the bankrupt retained in his possession and under his control, the securities forming the assets of the corporation; in numerous instances, the bankrupt dealt with the assets of corporation as his own; the bankrupt from the time of the formation of the corporation, had power of attorney to act for it with extremely broad powers; the bankrupt was undoubtedly the guiding spirit in all of the affairs of the corporation throughout its entire corporate existence; the books and records already in evidence disclose that the corporation made disburse-

ments for the account of the bankrupt and various corporations owned by him, and that the major portion of the transactions of the corporation were transactions of this type, or transactions in which the bankrupt or the corporations which he owned, were involved; the books and records of the All Continent Corporation are not in accord with the bankrupt's books and records; notes given by the bankrupt to the All Continent Corporation have been foreclosed by sale of additional assets of the bankrupt a few months prior to the bankruptcy; other assets were sold by the bankrupt to the corporation just prior to his bankruptcy; the frequent occurrence of erasures, corrections, and interlineations, in the books of the All Continent Corporation, in most instances, apparently in transactions involving the bankrupt; this chain of facts and circumstances and many others in the record of testimony already adduced, demonstrate clearly that the affairs of the All Continent Corporation were so related to and intertwined with the property and affairs of the bankrupt as to render absolutely necessary to the proper administration of the estate of the bankrupt a complete and thorough examination and audit by the Trustee of the books and records of the All Continent Corporation."

[fol. 7] 9. As a result of the conclusion and findings of said referee in the proceedings instituted by petitioner herein as aforesaid, he, the said referee, entered an order in this cause on August 18, 1936, whereby it was ordered that said All Continent Corporation and its officers, agents and employees were directed to forthwith deliver to petitioner herein, trustee for the above named bankrupt, "all cash, books, journals, ledgers, transfer ledgers, check books, check stubs, cancelled checks, bank books, bank statements, brokerage statement and contracts (with the exception of current check books) of the All Continent Corporation for the purpose of enabling the said trustee to make a thorough and complete examination and audit thereof to ascertain such facts or information as is therein contained respecting the acts, conduct and property of the bankrupt," said books and records to be so delivered upon conditions set forth in said order.

10. Immediately after the entry of the aforesaid order on August 18, 1936, said All Continent Corporation filed its

petition in this court for the purpose of reviewing said order of said referee, and in said petition it is averred that said order is erroneous because among other things it is alleged that said All Continent Corporation is a separate entity, apart from the bankrupt herein, and that the effect of said order was to determine that said All Continent Corporation and said bankrupt were in fact one and the same, so that the direction to turn said books over to petitioner, the said trustee, was to direct that they be so turned over as the books of said bankrupt, all of which was not justified in fact and was against the weight of the evidence then before the court as the result of said 21-a examination.

[fol. 8] 11. In conjunction with said petition to review, said All Continent Corporation also applied to this court by petition for an order to stay the operation of said order made by said referee on August 18, 1936, as aforesaid, until the legality thereof was determined by this court under the aforesaid petition to review. Accordingly, this court did enter order herein on August 21, 1936, staying the mandate of said order and directing hearing on said petition to review on September 9, 1936. Hearing on said petition to review was duly had on said date last mentioned above and the determination of the questions there involved are still pending before this court undetermined.

12. During the progress of the said Section 21-a examination, said Eva Fox was called for examination. Said Eva Fox is now and for some time has been the president of All Continent Corporation. As a result of the refusal of the said Eva Fox to submit to examination concerning the affairs of said All Continent Corporation and particularly the acts and conduct of the above named bankrupt with it, the aforesaid referee in bankruptcy has cited said Eva Fox to this court for contempt. Petitioner herein has joined with the Capital Company and Chicago Title and Trust Company, creditors on whose application said examination is being conducted, in filing petition with this court praying that said Eva Fox be adjudged in contempt for her refusal to testify and said contempt proceedings are now pending before this court.

13. On September 9, 1936, petitioner herein was served with subpœna in Equity issued out of the United States District Court for the Eastern District of Pennsylvania,

[fol. 9] together with copy of bill of complaint filed in said court in a certain suit instituted by All Continent Corporation against John S. Wynn, James H. Wynn, Harold A. Longwell, E. Schuyler Jackson, Jr., Russell R. Hires, Archibald W. Austin, James B. Borden, Frederick W. Winterberg, J. Maurice Wynn and James A. Longwell, co-partners trading under the firm name of J. W. Sparks & Company, Capital Company and Hiram Steelman, Trustee of the Estate of William Fox, a bankrupt, copies of which subpœna and bill of complaint are attached hereto, marked Exhibits "A" and "B" and by this reference made a part hereof.

14. On September 18, 1936, petitioner herein was served with a copy of an order to plead entered in the aforesaid suit pending in the said United States District Court for the Eastern District of Pennsylvania, and a copy of said order to plead is attached hereto, marked Exhibit "C" and by this reference is made a part hereof.

15. By virtue of the proceedings last mentioned above, said All Continent Corporation is endeavoring to force the trial of the issue of the ownership of property standing in its name concerning the real, true and bona fide ownership of which examination and investigation is now being made in orderly procedure under said Section 21-a of said Bankruptcy Act, by virtue of permission and leave granted by said order entered in this cause as aforesaid. To permit said All Continent Corporation to proceed with said litigation before said investigation and examination under Section 21-a of said Bankruptcy Act is concluded would require petitioner herein to enter upon the trial of the ques-[fol. 10] tion of the ownership of the property and assets mentioned in said bill of complaint, copy of which is attached hereto, without such knowledge and information as might be gleaned from the orderly continuance of said 21-a examination and a complete examination and audit of the books of All Continent Corporation. From the facts and information which has come to the knowledge of the petitioner, he is strongly of the belief and opinion that All Continent Corporation and the bankrupt, William Fox, are one and the same, and he confidently believes that if the examination and investigation which is now being conducted under said Section 21-a of the Bankruptcy Act, as aforesaid,

is permitted to proceed unhampered and unobstructed by the unlawful and improper acts and conduct of those persons subpœned to appear before this Court for examination, then it will be definitely and conclusively determined that said All Continent Corporation and said bankrupt William Fox are one and the same.

16. By means of the institution of its said suit in said Eastern District of Pennsylvania, said All Continent Corporation is endeavoring to hinder, impede, harass, obstruct and prevent the orderly, proper and legal administration of the affairs of this bankrupt estate, and particularly the efforts and activities of the petitioner herein, the trustee for said bankrupt, in his efforts and activities looking toward the discovery and acquisition of assets in said estate, and to permit All Continent Corporation to continue with the prosecution of its said litigation in said Eastern District of Pennsylvania would result in great and irreparable damage to this estate and all parties interested therein, and also it might result in All Continent Corporation acquiring unfair, unreasonable and unjust advantage over petitioner [fol. 11] in the management and administration of the affairs of this estate.

17. Said All Continent Corporation has entered its appearance in this cause and has filed claim for moneys claimed to be due it from said bankrupt, William Fox. Said All Continent Corporation at the present time is maintaining its only business office in the City of Atlantic City, Atlantic County, New Jersey, where it keeps all of its said books of account, records, etc., and the same are there in charge of Herbert Leitstein, who is one of the persons at present under examination in pursuance of the order entered in this cause by virtue of said Section 21-a of said Bankruptcy Act as aforesaid.

18. By the schedules which were filed herein by said bankrupt he claims to have liabilities amounting to $9,535,261.91 and assets amounting to $1,590,100.00. Of the total of said assets only the sum of $100.00 was in cash, although said schedules disclose that said bankrupt at or about the time of filing his petition for adjudication paid to his attorneys, fees aggregating the sum of $7500.00 in cash. Among the other assets listed in said bankruptcy schedules your petitioner has been unable thus far to find

anything of value which might be converted into cash. Since the filing of said petition in bankruptcy and the schedules affixed thereto, said bankrupt has delivered to petitioner certain certificates of credit of deposits in banks of Germany and Austria, alleging that they have immediate cash value. Inquiry by this petitioner has disclosed the fact that said certificates of deposit have little if any value, and whatever value said certificates do have would in all probability not be turned over to petitioner for use out-
[fol. 12] side the boundary limits of said countries. There are, therefore, no funds in the hands of trustee herein with which he can adequately and properly defend said litigation pending in said United States District Court for the Eastern District of Pennsylvania, and to be compelled to defend said pending suit in that district would result in great disadvantage and might cause great loss and damage to this bankrupt estate.

Your petitioner therefore prays:

1. That this by its order or decree enjoin and restrain said All Continent Corporation, its officers, servants, agents and attorneys from proceeding with or further prosecuting its said action instituted by it in the United States District Court for the Eastern District of Pennsylvania until the further order of this Court; and

2. That petitioner herein shall have such other general relief as may be deemed just and proper under the circumstances the premises considered.

Wm. Elmer Brown, Jr., Attorney for Hiram Steelman, Trustee for William Fox, Bankrupt.

AFFIDAVIT OF HIRAM STEELMAN

STATE OF NEW JERSEY,
County of Atlantic, ss:

Hiram Steelman, being duly sworn according to law, on his oath deposes and says:

1. That William Fox, the above named bankrupt, was adjudicated a bankrupt by order of this Court on May 29, 1936.

[fol. 13] 2. Thereafter, on June 25, 1936, I was appointed trustee of said bankrupt and his estate by Honorable Robert E. Steedle, Referee in Bankruptcy, to whom this matter was referred, and promptly thereafter duly qualified as such Trustee and thereby became entitled to receive into my possession all of the assets of said bankrupt.

3. That thereafter upon the petition of the Capital Company and Chicago Title and Trust Company, two of the creditors of said bankrupt, it was ordered that All Continent Corporation, a corporation of the State of Delaware, Eva Fox, the wife of the bankrupt, Belle Fox and Mona Fox, both daughters of the bankrupt, Herbert Leitstein and Joseph Hart should be examined under Section 21-a of the Bankruptcy Act of 1898. Said order directing said examination was entered herein on June 23, 1936.

4. In pursuance of said order directing said examination subpoenas were issued out of this Court directing all of said parties named in said order to appear before the aforesaid Referee for examination and requiring them to produce certain books and records. All of said subpoenas were duly served upon said parties.

5. Said examination by virtue of said order began on July 6, 1936, and has continued to be conducted on the following dates, to wit: July 6, 7, 8, 9, 14, 15, 16, 21, 22, 23, 28, 29, 30, August 4, 5, 6, 12, 18, 19, 20, 25, 26, September 1 and 2, 1936.

6. As Trustee in bankruptcy for the above named bankrupt, I am charged with the duty and obligation of discovering and acquiring possession of all of the property and [fol. 14] assets of said bankrupt, and in pursuance of my duty and obligation in that respect I am interested in the progress of said examination and any benefit that might result therefrom. I have been personally present during most of the time that examination of witnesses has taken place by virtue of the aforesaid order, and at times when not present at said examinations, have been represented at said examinations by my attorney duly appointed.

7. The aforesaid examination is being conducted for the purpose of inquiring into the acts, conduct and property of the bankrupt. Said examination has not been completed. For the most part said examination has been conducted for

the purpose of inquiring into the acts and conduct of the bankrupt in connection with numerous transactions which said bankrupt had with said All Continent Corporation.

8. As a result of information and facts which came to me as result of disclosures made during said examination, I made application to said Referee in Bankruptcy to compel All Continent Corporation to turn over its books and records to me, as Trustee for said bankrupt, for complete examination and audit for the purpose of ascertaining such information as is therein contained respecting the acts, conduct and property of the bankrupt. As a result of said proceedings had before said referee, he, the said referee, filed conclusions herein in which the facts and circumstances respecting the transactions which had heretofore taken place between said All Continent Corporation and said bankrupt were summarized as follows:

"The All Continent Corporation, whose books and records are here sought to be examined, was the creation of [fol. 15] the bankrupt himself; every dollar of its capital came from the bankrupt; by the formation of the corporation, he divested himself of a very substantial portion of his property; all of its capital stock, now allegedly owned by the wife of the bankrupt, has never been transferred upon the books of the corporation, and the bankrupt still appears as the record holder thereof; from the time of the formation of the corporation, the bankrupt retained in his possession and under his control, the securities forming the assets of the corporation; in numerous instances, the bankrupt dealt with the assets of corporation as his own; the bankrupt from the time of the formation of the corporation, had power of attorney to act for it with extremely broad powers; the bankrupt was undoubtedly the guiding spirit in all of the affairs of the corporation throughout its entire corporate existence; the books and records already in evidence disclose that the corporation made disbursements for the account of the bankrupt and various corporations owned by him, and that the major portion of the transactions of the corporation were transactions of this type, or transactions in which the bankrupt or the corporations which he owned, were involved; the books and records of the All Continent Corporation are not in accord with the bankrupt's books and records; notes given by the bankrupt to the All Continent Corporation have been fore-

closed by sale of additional assets of the bankrupt a few months prior to the bankruptcy; other assets were sold by the bankrupt to the corporation just prior to his bankruptcy; the frequent occurrence of erasures, corrections, and interlineations, in the books of the All Continent Corporation, in most instances, apparently in transactions involving the bankrupt; this chain of facts and circumstances and many others in the record of testimony already adduced, demonstrate clearly that the affairs of the All Con- [fol. 16] tinent Corporation were so related to and intertwined with the property and affairs of the bankrupt as to render absolutely necessary to the proper administration of the estate of the bankrupt a complete and thorough examination and audit by the Trustee of the books and records of the All Continent Corporation."

9. As a result of the conclusions and findings of said referee in the proceedings instituted herein as aforesaid, he, the said referee, entered an order in this cause on August 18, 1936, whereby it was ordered that said All Continent Corporation and its officers, agents and employees were directed to forthwith deliver to me, as trustee for the above named bankrupt, "all cash books, journals, ledgers, transfer ledgers, check books, check stubs, cancelled checks, bank books, bank statements, brokerage statements and contracts (with the exception of current check books), of the All Continent Corporation for the purpose of enabling me to make a thorough and complete examination and audit thereof to ascertain such facts or information as is therein contained respecting the acts, conduct and property of the bankrupt," said books and records to be so delivered upon conditions set forth in said order.

10. Immediately after the entry of the aforesaid order on August 18, 1936, said All Continent Corporation filed its petition in this court for the purpose of reviewing said order of said referee, and in said petition it is averred that said order is erroneous because among other things it is alleged that said All Continent Corporation is a separate entity, apart from the bankrupt herein, and that the effect of said order was to determine that said All Continent Corporation and said bankrupt were in fact one and the same, [fol. 17] so that the direction to turn said books over to me, as said trustee, was to direct that they be so turned

over as the books of said bankrupt, all of which was not justified in fact and was against the weight of the evidence then before the court as the result of said 21-a examination.

11. In conjunction with said petition to review, said All Continent Corporation also applied to this Court by petition for an order to stay the operation of said order made by said referee on August 18, 1936, as aforesaid, until the legality thereof was determined by this court under the aforesaid petition to review. Accordingly, this court did enter order herein on August 21, 1936, staying the mandate of said order and directing hearing on said petition to review on September 9, 1936. Hearing on said petition to review was duly had on said date last mentioned above and the determination of the questions there involved are still pending before this court undetermined.

12. During the progress of the said Section 21-a examination, said Eva Fox was called for examination. Said Eva Fox is now and for some time has been the president of All Continent Corporation. As a result of the refusal of the said Eva Fox to submit to examination concerning the affairs of said All Continent Corporation and particularly the acts and conduct of the above named bankrupt with it, the aforesaid referee in bankruptcy has cited said Eva Fox to this court for contempt. I have joined with the Capital Company and Chicago Title and Trust Company, creditors on whose application said examination is being conducted, in filing petition with this court praying that said Eva Fox be adjudged in contempt for her refusal to [fol. 18] testify and said contempt proceedings are now pending before this court.

13. On September 9, 1936, I was served with subpoena in Equity issued out of the United States District Court for the Eastern District of Pennsylvania, together with copy of bill of complaint filed in said court in a certain suit instituted by All Continent Corporation against John S. Wynn, James H. Wynn, Harold A. Longwell, E. Schuyler Jackson, Jr., Russell R. Hires, Archibald W. Austin, James B. Borden, Frederick W. Winterberg, J. Maurice Wynn and James A. Longwell, co-partners trading under the firm name of J. W. Sparks & Company, Capital Company and Hiram Steelman, Trustee of the Estate of William Fox, a bankrupt, copies of which subpoena and bill of complaint

are attached hereto marked Exhibits "A" and "B" and by this reference made a part hereof.

14. On September 18, 1936, I was served with a copy of an order to plead entered in the aforesaid suit pending in the said United States District Court for the Eastern District of Pennsylvania, and a copy of said order to plead is attached hereto, marked Exhibit "C" and by this reference is made a part hereof.

15. By virtue of the proceedings last mentioned above, said All Continent Corporation is endeavoring to force the trial of the issue of the ownership of property standing in its name concerning the real, true and bona fide ownership of which examination and investigation is now being made in orderly procedure under said Section 21-a of said Bankruptcy Act, by virtue of permission and leave granted by [fol. 19] said order entered in this cause, as aforesaid. To permit said All Continent Corporation to proceed with said litigation before said investigation and examination under Section 21-a of said Bankruptcy Act is concluded would require me to enter upon the trial of the question of the ownership of the property and assets mentioned in said bill of complaint, copy of which is attached hereto, without such knowledge and information as might be gleaned from the orderly continuance of said 21-a examination and a complete examination and audit of the books of All Continent Corporation. From the facts and information which has come to my knowledge, I am strongly of the belief and opinion that All Continent Corporation and the bankrupt, William Fox, are one and the same, and I confidently believe that if the examination and investigation which is now being conducted under Section 21-a of the Bankruptcy Act, as aforesaid, is permitted to proceed unhampered and unobstructed by the unlawful and improper acts and conduct of those persons subpoenaed to appear before this Court for examination, then it will be definitely and conclusively determined that said All Continent Corporation and said bankrupt William Fox are one and the same.

16. By means of the institution of its said suit in said Eastern District of Pennsylvania, said All Continent Corporation is endeavoring to hinder, impede, harass, obstruct and prevent the orderly, proper and legal administration of

the affairs of this bankrupt estate, and particularly my efforts and activities herein, as trustee for said bankrupt, in my efforts and activities looking toward the discovery and acquisition of assets in said estate, and to permit All Continent Corporation to continue with the prosecution of [fol. 20] its said litigation in said Eastern District of Pennsylvania would result in great and irreparable damage to this estate and all parties interested therein, and also it might result in All Continent Corporation acquiring unfair, unreasonable and unjust advantage over the trustee herein in the management and administration of the affairs of this estate.

17. Said All Continent Corporation has entered its appearance in this cause and has filed claim for moneys claimed to be due it from said bankrupt, William Fox. Said All Continent Corporation at the present time is maintaining its only business office in the City of Atlantic City, Atlantic County, New Jersey, where it keeps all of its said books of account, records, etc., and the same are there in charge of Herbert Leitstein, who is one of the persons at present under examination in pursuance of the order entered in this cause by virtue of said Section 21-a of said Bankruptcy Act as aforesaid.

18. By the schedules which were filed herein by said bankrupt he claims to have liabilities amounting to $9,535,-261.91 and assets amounting to $1,590,100.00. Of the total of said assets only the sum of $100.00 was in cash, although said schedules disclose that said bankrupt at or about the time of filing his petition for adjudication paid to his attorneys fees aggregating the sum of $7500.00 in cash. Among the other assets listed in said bankruptcy schedules I have been unable thus far to find anything of value which might be converted into cash. Since the filing of said petition in bankruptcy and the schedules affixed thereto, said bankrupt has delivered to me certain certificates of credit of deposits in banks of Germany and Austria, alleging that they have [fol. 21] immediate cash value. Inquiry by me has disclosed the fact that said certificates of deposit have little if any value, and whatever value said certificates do have would in all probability not be turned over to me for use outside the boundary limits of said countries. There are, therefore, no funds in my hands, as trustee, with which I

can adequately and properly defend said litigation pending in said United States District Court for the Eastern District of Pennsylvania, and to be compelled to defend said pending suit in that district would result in great disadvantage and might cause great loss and damage to this bankrupt estate.

Hiram Steelman.

Sworn and subscribed to before me this 21st day of September, 1936. Edna C. Heller, Notary Public of New Jersey. My Commission Expires Jan. 13, 1941.

EXHIBIT "A" TO AFFIDAVIT

Subpœna in Equity.

UNITED STATES DISTRICT COURT——DIVISION, EASTERN DISTRICT OF PENNSYLVANIA

The President of the United States of America to John S. Wynn, James H. Wynn, Harold A. Longwell, E. Schuyler Jackson, Jr., Russell R. Hires, Archibald W. Austin, James B. Borden, Frederick W. Winterberg, J. Maurice [fol. 22] Wynn, and James A. Longwell, Copartners trdg. under the firm name of J. W. Sparks & Co. Capital Company and Hiram Steelman, Trustee of the Estate of William Fox, a Bankrupt.

You are hereby commanded that all excuses and delays set aside you be and appear within twenty days after the service of this subpœna at the Clerk's Office of the United States District Court for the Eastern District of Pennsylvania, at Philadelphia, the 28th of September, to answer unto the—bill of complaint of All Continent Corporation in said Court exhibited against you. Hereof you are not to fail at your peril, and have you then and there this writ.

Witness the Honorable United States District Judge at Philadelphia, this 8th day of September, A. D. 1936.

George Brodbeck, Clerk, by E. G. Johnson, Deputy Clerk.

Memorandum

The Defendants in this case are required to file an answer or other defense in the Clerk's office of said Court,

on or before the twentieth day after service of this writ, excluding the day thereof; otherwise the Bill may be taken pro confesso.

[fol. 23] EXHIBIT "B" TO AFFIDAVIT

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA, JUNE TERM, 1936

In Equity

No. 9533

ALL CONTINENT CORPORATION, Plaintiff,

v.

JOHN S. WYNN, JAMES H. WYNN, HAROLD A. LONGWELL, E. Schuyler Jackson, Jr., Russell R. Hires, Archibald W. Austin, James B. Borden, Frederick W. Winterberg, J. Maurice Wynn and James A. Longwell, Copartners trading under the firm name of J. W. Sparks & Company; Capital Company, and Hiram Steelman, Trustee of the Estate of William Fox, a Bankrupt, Defendants

Bill of Complaint

To the Honorable, the Judges of the United States District Court for the Eastern District of Pennsylvania:

Plaintiff, All Continent Corporation, files this Bill of Complaint against the above named defendants and says:

[fol. 24] 1. Plaintiff, All Continent Corporation, is a corporation duly organized and existing under the laws of the State of Delaware, having its principal office in that State, in the City of Wilmington and County of New Castle. It is a citizen and resident of the State of Delaware and of the District of Delaware.

2. The defendant John S. Wynn is a citizen of the State of Pennsylvania, and a resident and inhabitant of Merion, in the County of Montgomery, Pennsylvania, and of the Eastern District of Pennsylvania; the defendant James H. Wynn is a citizen of the State of Pennsylvania and a resident and inhabitant of Haverford Township, Montgomery

County, Pennsylvania, and of the Eastern District of Pennsylvania; the defendant Harold A. Longwell is a citizen of the State of New Jersey, and resident and inhabitant of Ridgewood, New Jersey, and of the District of New Jersey; the defendant E. Schuyler Jackson, Jr., is a citizen of the State of New York, and a resident and inhabitant of Bronxville, in the State of New York, and of the District of New York; the defendant Russell R. Hires is a citizen of the State of New Jersey, and a resident and inhabitant of Alloway, New Jersey, and of the District of New Jersey; the defendant Archibald W. Austin is a citizen of the State of New Jersey, and a resident and inhabitant of Vineland, in the State of New Jersey, and of the District of New Jersey; the defendant James B. Borden is a citizen of the State of Pennsylvania, and a resident and inhabitant of the City of Philadelphia, in the County of Philadelphia Pennsylvania, and of the Eastern District of Pennsylvania; the defendant Frederick W. Winterberg is a citizen of the State of New York, and a resident and inhabitant of Brooklyn, in the [fol. 25] County of Brooklyn, State of New York, and of the Eastern District of New York; the defendant J. Maurice Wynn is a citizen of the State of Pennsylvania, and a resident and inhabitant of Wayne, in the County of Montgomery and State of Pennsylvania, and of the Eastern District of Pennsylvania; and the defendant James A. Longwell is a citizen of the State of Pennsylvania, and a resident and inhabitant of the City of Philadelphia, County of Philadelphia, in the State of Pennsylvania, and of the Eastern District of Pennsylvania. They are co-partners trading under the name of J. W. Sparks & Company, which partnership has its principal place of business in the City of Philadelphia, in the Eastern District of Pennsylvania. They are engaged in the stock brokerage and investment business.

3. Defendant Capital Company is a corporation organized and existing under the laws of the State of California, having its principal place of business in the City of San Francisco, California. It is a citizen and resident of the State of California.

4. Defendant Hiram Steelman is a citizen of the State of New Jersey, residing at Atlantic City, in that State. He was on the 25th day of June, 1936, appointed Trustee in Bankruptcy in the matter of William Fox, Bankrupt, by

the District Court for the District of New Jersey, No. 3033, In Bankruptcy, 1936.

5. The ground upon which the jurisdiction of this Court depends is the diversity of citizenship between plaintiff and each and all of the defendants. Relief is sought to remove a cloud from certain property of the plaintiff located within [fol. 26] the Eastern District of Pennsylvania and hereafter described, under Section 57 of the Judicial Code, 28 U. S. C. A., Section 118.

6. The matter in controversy exceeds the sum of $3,000 exclusive of interest and costs.

7. On or about January 30, 1936, plaintiff opened an account with the Philadelphia office of J. W. Sparks & Company and at that time delivered to J. W. Sparks & Company, in the City of Philadelphia, certain securities. J. W. Sparks & Company among other things thereupon agreed orally with plaintiff to keep said securities safely in the City of Philadelphia for and on behalf of plaintiff, to make delivery of the same or any part thereof at the order and direction of the plaintiff, and to receive for and on behalf of plaintiff such additional securities as plaintiff might from time to time purchase and direct to be delivered to J. W. Sparks & Company.

8. Between January 30, 1936, and on or about March 27, 1936, plaintiff sold certain securities held by J. W. Sparks & Company in the said account, and caused other securities to be purchased and delivered to J. W. Sparks & Company to be held for its account. Since January, 1936, J. W. Sparks & Company has also collected certain dividends and interest for the account of plaintiff.

9. A true and correct statement of the account between J. W. Sparks & Company and plaintiff and of the securities held by the former for the latter as of August 31, 1936, is attached hereto, made part hereof, and marked Exhibit "A". The approximate value of the securities held in such account is in excess of $500,000. Said securities are physi- [fol. 27] cally located in the possession of J. W. Sparks & Company in the City of Philadelphia, in the Eastern District of Pennsylvania, and constitute personal property of the plaintiff within this District.

10. On July 18, 1935, defendant Capital Company, upon a written confession of judgment, entered a judgment

against one William Fox, in the United States District Court for the Southern District of New York, in the sum of $297,412.91.

11. On March 27, 1936, Capital Company, by its attorney, served upon J. W. Sparks & Company subpoena for examination of third parties in proceedings supplemental to judgment, purporting to be issued under the authority of Section 779(2) of the Civil Practice Act, New York. A true and correct copy of this subpoena is attached hereto, made part hereof, and marked Exhibit "B". This su-pœna will hereafter be referred to as the "third-party subpoena". Said third-party subpoena required J. W. Sparks & Company to be examined concerning property of the judgment debtor held either in his name or in the name, among others, of All Continent Corporation.

12. As will be noted by reference to the third-party subpoena, there is endorsed thereon a copy of Section 781 of the Civil Practice Act of New York, which provides in part that "The third person • • • is forbidden to transfer • • • property belonging to the judgment debtor • • • until further order of the Court", and that anyone who violates "the provisions of such restraining provision shall be subject to punishment by the Court by fine or imprisonment, or either, as and for a contempt."

[fol. 28] 13. J. W. Sparks & Company thereupon moved to vacate the third-party subpoena, averring that it had never had an account with William Fox or with any other party named in the subpoena, except All Continent Corporation. This motion to vacate was denied by order of the District Court for the Southern District of New York, dated April 29, 1936, and on appeal said order was affirmed by the Circuit Court of Appeals for the Second Circuit, in an opinion handed down August 6, 1936. It was not decided in these proceedings that J. W. Sparks & Company held any property of the judgment debtor, or that the account of All Continent Corporation or any part of it was in fact the property of the judgment debtor. It was, however, judicially established by these proceedings that the subpœna itself was valid, and constituted an effective injunction against the transfer by J. W. Sparks & Company of any property which should ultimately be determined to be that

of the judgment debtor, as appears from the following excerpt from the opinion:

"The next objection is that §781 of the Civil Practice Act is unconstitutional in imposing an injunction without a judge's order. If the statute affected to declare in advance of a hearing that the plaintiff's attorney might forbid the 'third party's' transfer of any specific property under pain of contempt, there would indeed be much to say for that argument. It does not do so; it measures the extent of the prohibition by the judgment debtor's ownership of the property; the 'third party' is forbidden to transfer only what property he owns, and cannot be punished without proof that any property thereafter transferred was the debtor's in fact. The statute therefore does no more than declare it unlawful to transfer a judgment debtor's property after notice and impose the penalty of contempt for disobedience. It anticipates no judicial decision; it merely [fol. 29] creates a new class of unlawful acts, as statutes have done from time immemorial. We are not to be deceived by the fact that the command of the statute is called an injunction, or that it is punished by a court, not by trial with jury."

14. Said injunction is at the present time still in full force and effect in so far as it prohibits J. W. Sparks & Company, under pain of punishment for contempt, from transferring or disposing of the account of All Continent Corporation or any of the securities contained therein should such account or securities at any time be determined to be the property of William Fox.

15. In the proceedings upon the motion to vacate the third-party subpœna issued to J. W. Sparks & Company, there were filed affidavits on behalf of defendant Capital Company averring that the latter had reason to believe the securities in the account of All Continent Corporation were in fact the property of William Fox; and defendant Capital Company has consistently claimed that the securities in the said account are in fact the property of William Fox, and not that of plaintiff.

16. Subsequent to the adjudication of William Fox as a bankrupt, defendant Hiram Steelman appeared before the District Court for the District of New Jersey and joined

in an application to have the third-party subpœna proceedings and the injunction contained in the said third-party subpoena continued, notwithstanding the pendency of the bankruptcy proceedings, as a result of which the District Court granted such application and permitted the said third-party subpoena proceedings and the injunction con-
[fol. 30] tained therein to continue; and since the date of his appointment as such Trustee has ratified and approved in all respects the procedure followed by the Capital Company, as aforesaid, with reference to the said third-party subpoena and the injunction contained therein.

17. The securities in the aforesaid account of All Continent Corporation with the said J. W. Sparks & Company were not at any time and are not now the property of the said William Fox, judgment debtor, but on the contrary are now and at all times were the property of the plaintiff.

18. Plaintiff has tendered to J. W. Sparks & Company the amount of its debit balance and has demanded delivery of the securities owned by it and held in its account with J. W. Sparks & Company. J. W. Sparks & Company has refused and still does refuse to turn over to plaintiff the securities in the aforesaid account of All Continent Corporation with J. W. Sparks & Company. J. W. Sparks & Company bases this refusal upon the fear of contempt proceedings if the securities in the account should ever be established to be in fact the property of William Fox and not of the plaintiff, since the burden of determining whether the securities in the said account do or do not in fact belong to William Fox is placed by the third-party subpoena proceedings upon J. W. Sparks & Company.

19. Plaintiff is advised, believes and therefore avers that the third-party subpoena issued on behalf of defendant Capital Company, together with the accompanying restraint against transfer of any property belonging to William Fox, and the claim of Capital Company that the account of plaintiff is in fact the property of William Fox, constitute an en-
[fol. 31] cumbrance and cloud upon the title of plaintiff to the securities in its account with J. W. Sparks & Company; and that defendant Hiram Steelman, by joining in the application for continuance of the third-party subpoena proceedings and the injunction against J. W. Sparks & Com-

pany, has joined with defendant Capital Company in preserving such cloud upon plaintiff's title.

20. Plaintiff is further advised, believes and therefore avers, that it is without adequate remedy at law and will suffer irreparable damage if the relief here prayed for is not granted. It is advised, believes and therefore avers, that action by defendant Hiram Steelman, as Trustee in Bankruptcy, to reach the securities in the account with J. W. Sparks & Company must be by plenary suit and that action by defendant Capital Company to reach such securities must be by independent bill in equity; that plaintiff should not be required to await the bringing of these suits at the pleasure of the several defendants; and that an action at law to recover the securities or damages for the retention thereof would not do complete equity among the parties.

Wherefore, plaintiff prays:

(a) That this Court make an order directing those defendants who are not inhabitants of or found within the Eastern District of Pennsylvania to appear, plead, answer or demur, upon a day to be designated by this Court.

(b) That this Court enter a decree removing the cloud from the securities held by J. W. Sparks & Company and declaring them to be the property of plaintiff.

(c) That this Court, by way of further relief, decree that [fol. 32] upon payment of the debit balance of plaintiff, J. W. Sparks & Company deliver to plaintiff all securities owned by plaintiff.

(d) Such other and further relief as may seem proper.

Pepper, Bodine, Stokes & Schoch, Attorneys for Plaintiff.

Duly sworn to by Belle Fox. Jurat omitted in printing.

[fol. 33] EXHIBIT "A" TO BILL OF COMPLAINT

All Continent Corp., c/o Eva Fox, Hotel Claridge, Atlantic City, N. J.
In Account with J. W. Sparks & Co., 1510 Chesnut Street, Philadelphia

Date	Securities Bought or Received	Sold or Delivered	Description	Price	Amount Debit	Credit	Balance
			Balance				
			Securities				
Jul. 31 36	500		Savoy Oil				307,376.86
	5100		I R T				
	100		Bankers Sec. Com				
	5600		Radio				
	500		MKT				
	500		Yellow Truck				
	1500		Genl Realty				
	500		Ohio Oil				
	6800		Warner Pict				
	2300		Mid States Pete B V T C				
	1200		White Sew Machine				
	400		Celotex				
	1400		Amer Chain				
	1000		Loft Inc				
	200		Atl Coast Line				
	500		Amer Water Wks				
	500		Nor Amer Co				
	100		Col G & E				
	300		H. L. Green				
	700		Pierce Oil Pfd				
	7400		Houston Oil				
	500		Beth Steel				
	300		U S Ind Alcohol				
	500		Cons Oil				
	1000		Republic Stl				
Aug. 3 36			DIV 300 H. L. Green			75.00 cr	307,301.86
Aug. 17 36			DIV 500 Cons Oil			75.00—	307,226.86
Aug. 31 36			2¼% Int	727.64			307,954.50

[fol. 34] EXHIBIT "B" TO BILL OF COMPLAINT

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In the Matter of SUPPLEMENTARY PROCEEDINGS, CAPITAL COMPANY, a California Corporation, Judgment-Creditor,

against

WILLIAM FOX, Judgment-Debtor

Subpœna for Examination of Third Party

The President of the United States of America to J. W. Sparks & Company, 50 Broadway, New York, N. Y., by any of its partners or officers, Greeting:

Whereas, a judgment in the sum of $297,412.91 was recovered by the Capital Company, a California Corporation,

against William Fox in the United States District Court, Southern District of New York, on July 18, 1935 and entered and docketed in the office of the clerk thereof on said date and the above named third party has a place for the regular transaction of business or resides in the southern district of New York and

Whereas, the undersigned has reason to believe that the said third party has property of the judgment-debtor exceeding $10.00 in value now therefore

[fol. 35] We Command You that all and singular business and excuses being laid aside, you appear in your proper person before one of the judges of the District Court of the United States for the Southern District of New York in the second circuit in room #506, New United States Court House at Foley Square in the Borough of Manhattan, City of New York on March 31, 1936, at 10:30 o'clock in the forenoon of the same day to be examined under oath concerning properties or monies of William Fox, judgment-debtor, in your possession now or at any time since January 1929, held either in his name or in the name of Mrs. William Fox, Eva Fox, Mona Fox, Mona Tauszig, Caroline Leah Tauszig Belle Fox, Isabel Fox, Bella Fox, Bessie Livingston, Ben Leo, Jack G. Leo, J. L. Rubenstein, John Zanft, Herbert Leitstein, Theodore Altman, Adolph Wolf, All Continent Corporation, Park Wood Corporation, Grandeur Inc., Half Grandeur Holding Company, Georgetown Holding Company, Mitchell Camera Company or of any other person or corporation whatsoever and to produce at such examination all books, papers, and records in your possession or control which have or may contain information concerning such properties or monies and for a failure to attend you will be deemed guilty of a contempt of court and liable to punishment.

Witness, Hon. John C. Knox, Judge of the District Court of the United States for the Southern District of New York at the City of New York the twenty-seventh day of March, 1936.

Charles Weiser, Clerk. (Seal.)

[fol. 36] Cravath, deGersdorff, Swaine & Wood, Attorneys for Judgment-Creditor, Office and Post Office Address: 15 Broad Street, New York, N. Y.

Civil Practice Act, Section 781, Transfer of Property by Judgment-Debtor or Third Party Enjoined. Upon the

service of this subpoena upon the judgment-debtor or any third party who has in his or its possession property or monies belonging to the judgment-debtor or claimed by the receiver of the said judgment-debtor, or who is indebted to the judgment-debtor, such judgment-debtor or third person is hereby forbidden to transfer, pay over, or otherwise dispose of such monies or property belonging to the judgment-debtor or thereafter acquired by or becoming due to him, not exempt by law from application to the satisfaction of the judgment until the further order of the court. Any person served with said subpoena who shall violate the provisions of such restraining provision shall be subject to punishment by the court by fine and imprisonment or either as and for a contempt. To effect such restraining provision a copy of this section must be endorsed upon the copy of the subpoena served under this article.

[fol. 37] EXHIBIT "C" TO AFFIDAVIT

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Equity. No. 9533

June Term, 1936

ALL CONTINENT CORPORATION, Plaintiff,

vs.

JOHN S. WYNN, JAMES H. WYNN, HAROLD A. LONGWELL, E. Schuyler Jackson, Jr., Russell R. Hires, Archibald W. Austin, James B. Borden, Frederick W. Winterberg, J. Maurice Wynn and James A. Longwell, Copartners trading under the firm name of J. W. Sparks & Company; Capital Company and Hiram Steelman, Trustee of the Estate of William Fox, a Bankrupt, Defendants

Order directing appearance of defendant without the district and directing service of copy of this order and of copy of plaintiff's bill on defendant, wherever found

Upon application of plaintiff's attorneys, it appearing to the undersigned Judge of the United States District Court for the Eastern District of Pennsylvania that this

is a suit commenced to enforce a claim to, and to remove an encumbrance, or lien, or cloud, upon title to, certain [fol. 38] personal property situated within the Eastern District of Pennsylvania, and that the defendant Hiram Steelman, Trustee of the Estate of William Fox, a Bankrupt, is not an inhabitant of or to be found within this District, but is a citizen and resident of another State than Pennsylvania, and that he has not voluntarily appeared to this action:

It is ordered that the said defendant Hiram Steelman, Trustee of the Estate of William Fox, a Bankrupt, appear, plead, answer or demur to the plaintiff's bill in said suit, in the District Court of the United States for the Eastern District of Pennsylvania, at Philadelphia, by the 28 day of September 1936, in default whereof the Court will proceed to the hearing and adjudication of said suit.

It is further ordered that a copy of this Order and a copy of the plaintiff's bill be personally served on said defendant, wherever found.

Dated this 8th day of September, 1936.

Welsh, United States District Judge.

A true copy certified to from the record.
Attest: Gilbert N. Ludwig, Deputy Clerk.

[fol. 39] In United States District Court, District of New Jersey

[Title omitted]

Order to Show Cause

The petitioner in the above entitled cause having filed his petition in the United States District Court in and for the District of New Jersey, wherein and whereby he prays for an order of this Court enjoining and restraining All Continent Corporation, its officers, servants, agents and attorneys from proceeding with or further prosecuting an action instituted by it in the United States District Court for the Eastern District of Pennsylvania until the further order of this Court, and for such other general relief as may be deemed just and proper under the circumstances, the premises considered;

Now, on reading the petition filed in this cause duly verified by the oath of the petitioner, Hiram Steelman, Trustee in Bankruptcy for William Fox, and it satisfactorily appearing to me that there are sufficient grounds for granting an order to show cause why such relief should not be granted;

It is, therefore, on this 22nd day of September, 1936, [fol. 40] Ordered that the said All Continent Corporation appear before me in the Court Room of the above entitled court, at the Post Office Building, at Camden, New Jersey, on the 25th day of September, 1936, at the hour of 10:30 o'clock in the forenoon, to show cause, if any it has, why it should not be enjoined from further prosecuting its suit against John S. Wynn, James H. Wynn, Harold A. Longwell, E. Schuyler Jackson, Jr., Russell R. Hires, Archibald W. Austin, James B. Borden, Frederick W. Winterberg, J. Maurice Wynn and James J. Longwell, co-partners trading under the firm name of J. W. Sparks Company, Capital Company and Hiram Steelman, Trustee of the Estate of William Fox, a bankrupt; and

It is further Ordered that copies of the verified petition and of this order which may be certified as "true copies" either by the attorney for the petitioner or by the petitioner, be served within One day upon said All Continent Corporation or upon its attorney.

John Boyd Avis, Judge of the United States District Court, for the District of New Jersey.

IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS

And now, September 25, 1936, comes All Continent Corporation, appearing de bene esse, by its Counsel, Frederick H. Spotts, Esq., and moves to dismiss the petition of the trustee for stay of litigation instituted by All Continent Corporation in the Eastern District of Pennsylvania, for the following reasons:—

1. The bankruptcy court is without jurisdiction to decree the requested stay in a summary proceeding.

[fol. 41] 2. The bankruptcy court has no power to grant the requested stay.

3. The principles of comity require that this court should not interfere with the process of the court in the Eastern District of Pennsylvania.

Riggins & Davis, Frederick H. Spotts, Attorney de bene esse for All Continent Corporation.

IN THE UNITED STATES DISTRICT COURT

OPINION OF COURT

Memorandum

AVIS, District Judge:

The trustee in the above bankruptcy case has filed a petition, the prayer of which is to restrain All Continent Corporation (hereinafter called Corporation) from further prosecution of a certain equity action instituted by Corporation against John S. Wynn, et al., trading as J. W. Sparks & Company, Capital Company and Hiram Steelman, trustee appointed in this action. The object of the suit is to recover certain securities in possession of Sparks & Company, which Corporation alleges to be its property. Capital Company is made a defendant because it has a judgment entered of record in the United States District Court for the Southern District of New York in the sum of $297,412.91 against William Fox, and is attempting to discover assets of bankrupt. The Capital Company has issued a subpœna against Sparks & Company, designated under the procedure as a "third party subpœna", which has endorsed upon it a restraint against Sparks & Company from transferring any property belonging to the [fol. 42] judgment debtor, who is William Fox, until the further order of the Court. It is claimed in the bill of complaint that under these circumstances Sparks & Company refused to deliver the securities to Corporation. It is further claimed that Hiram Steelman, as trustee, has appeared in this court and approved, or joined in, an application to permit the suit in the New York District Court to be continued, and that therefore the said trustee is also claiming an interest in the securities aforesaid. No proof was offered as to this fact, nor is any law or case argued or submitted to the Court to sustain the contention that

such action on the part of the trustee, if true, makes the trustee a party sufficient to justify his inclusion as a defendant in the Pennsylvania Court. The trustee has asserted that he has not made any claim on Sparks & Company for the securities.

William Fox was adjudicated bankrupt on his voluntary petition on May 29, 1936, and subsequently Hiram Steelman was appointed trustee. Since that time, on application of certain creditors, Robert E. Steedle, referee, to whom the matter was referred, has issued an order for examination of certain parties under Section 21 (a) of the Bankruptcy Act (11 USCA sec. 44 (a)), and considerable testimony has been taken under that order. It is not necessary in the instant proceeding that this testimony should be closely reviewed or analyzed. It is sufficient to state that a grave question has arisen as to whether the property and assets of Corporation actually belong to the defendant. If eventually it is found that it does, the title to the securities involved in the suit in the United States District Court for the Eastern District of Pennsylvania would be in bankrupt, and should be administered in the bankruptcy proceedings in this court.

[fol. 43] It is apparent from reading the bill of complaint, that the effort of Corporation in that suit is to force the trustee to appear and litigate the entire question now before this Court in the bankruptcy proceedings, that is, whether actually the property and assets of Corporation belong to the bankrupt. Such litigation as against Corporation, if ultimately deemed advisable, ought to be conducted by trustee after there has been a full and complete disclosure of the facts in the 21 (a) examinations. An examination of the cases demonstrates that creditors are entitled to have the assets of a bankrupt administered in the bankruptcy court. Any interference therewith may be restrained until that court has fully administered the assets. Especially is this so if the pendency or determination of an action will interfere with the proper and speedy enforcement of the Act or tend to embarass the court.

Counsel for Corporation challenges the jurisdiction of the Court on the ground that the instant proceeding is summary, and asserts that the trustee should proceed in a plenary suit. Numerous cases are cited, but none of them is pertinent to the issue. They all involve the question

of title to property claimed by the representative of the bankrupt's estate, which is in possession of a third party. In such instances the action must be by plenary suit, unless the claim of the third party appears to be only colorable, when it may be determined in a summary manner.

The petition of trustee in the instant case makes no direct claim of property as against Sparks & Company. The statements indicate that his claim is against the Corporation. He is not presently interested in the possession of the securities so long as his ultimate rights, if he has any, against the Corporation, are preserved.

The action in the court in Pennsylvania was commenced [fol. 44] on September 8, 1936, long after this court had jurisdiction of the bankrupt's estate, and whether leave of court was required before the institution of the action, I deem to be immaterial.

However, I am satisfied that to require the trustee to appear and defend that suit, with the bankruptcy proceedings in their present state, would interfere materially with proper administration.

I do not believe that I can restrain action of the Corporation against the other defendants, but I deem it my duty to restrain the Corporation as to further prosecution of its action against the trustee in bankruptcy.

Order accordingly.

IN THE UNITED STATES DISTRICT COURT

DECREE

Hiram Steelman, Esquire, the Trustee for the above-named bankrupt, having filed his petition in this cause by which it appears that All Continent Corporation, a corporation, has instituted a certain equity action in the United States District Court for the Eastern District of Pennsylvania against John S. Wynn, James H. Wynn, Harold A. Longwell, E. Schuyler Jackson, Jr., Russell R. Hires, Archibald W. Austin, James B. Borden, Frederick W. Winterberg, J. Maurice Wynn and James A. Longwell, copartners trading as J. W. Sparks & Company, Capital Company and Hiram Steelman, Trustee in Bankruptcy for William Fox, said petitioner herein, the object of which suit is to recover certain securities in possession of said J. W. Sparks & Company which said All Continent Corporation alleges to

be its property and upon the title of which said All Continent Corporation further alleges there is a cloud by [fol. 45] reason of a certain restraint endorsed upon a "third party subpœna" issued out of the United States District Court for the Southern District of New York and served upon said J. W. Sparks & Company in supplementary proceedings to discover assets of the aforesaid bankrupt which might be attached to satisfy a certain judgment entered in said court in favor of Capital Company and against said bankrupt.

And this Court being of the opinion that this petitioner, the trustee in this cause has been improperly made a party defendant in said suit pending in said United States District Court for the Eastern District of Pennsylvania and being further of the opinion, after due consideration of the facts and arguments of counsel for the parties, that the prosecution of said suit against said Trustee would interfere materially with the proper and orderly administration of the affairs of this bankrupt estate;

It is on this 7th day of October, 1936 Ordered that said All Continent Corporation be and it is hereby enjoined and restrained from further prosecuting its said suit instituted in the said United States District Court for the Eastern District of Pennsylvania against said Hiram Steelman, Trustee in Bankruptcy for William Fox, the petitioner herein.

And it is further Ordered that a copy of this order, certified by the attorney for petitioner herein, be served on said All Continent Corporation by serving same upon a director or officer thereof or upon its attorney.

John Boyd Avis, Judge of the United States District Court for the District of New Jersey.

[fol. 46] IN THE UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR ON APPEAL BY ALL CONTINENT CORPORATION

And Now, October 20th, 1936, All Continent Corporation, by Frederick H. Spotts, and Riggins & Davis, its attorneys, files the following as errors in the record, proceedings and judgment in the above case:

1. The Court erred in denying the motion of All Continent Corporation to dismiss the petition of the Trustee in Bankruptcy to restrain the said All Continent Corporation from further prosecuting an action against the said Trustee in Bankruptcy in the United States District Court for the Eastern District of Pennsylvania.

2. The Court erred in finding that the prosecution of said suit against said Trustee would interfere materially with the proper and orderly administration of the affairs of the bankrupt estate.

3. The Court erred in entering a final decree restraining All Continent Corporation from further prosecuting its suit instituted in the United States District Court for the Eastern District of Pennsylvania against Hiram Steelman, Trustee in Bankruptcy for William Fox.

Frederick H. Spotts, Riggins & Davis, Attorneys for All Continent Corporation, Appellant.

[fol. 47] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL

To the Honorable the Judges of the United States District Court for the District of New Jersey:

The above named All Continent Corporation, a corporation organized under the laws of the State of Delaware, is the respondent in proceedings brought by Hiram Steelman, Trustee in Bankruptcy for William Fox, the Bankrupt, to restrain the said All Continent Corporation from further prosecuting a suit instituted by the said All Continent Corporation in the United States District Court for the Eastern District of Pennsylvania against the said Hiram Steelman, Trustee in Bankruptcy.

It conceives itself aggrieved by the final decree of your Honorable Court enjoining and restraining it from further prosecuting its said suit instituted in the United States District Court for the Eastern District of Pennsylvania against said Hiram Steelman, Trustee in Bankruptcy for William Fox, entered in the United States District Court for the District of New Jersey on October 7, 1936; and does hereby appeal from said decree to the United States Circuit Court

of Appeals for the Third Circuit, for the reasons specified in the Assignments of Error filed herewith, and prays that this appeal may be allowed and that a citation may issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Third Circuit.

And your petitioner further prays that the proper order relating to the required security be made.

All Continent Corporation, by Frederick H. Spotts, Riggins & Davis, Its Attorneys.

[fol. 48] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL

Before AVIS, J.

A-D NOW, to wit, this 20th day of October, 1936, on consideration of the foregoing petition, it is upon motion of Frederick H. Spotts and Riggins & Davis, attorneys for All Continent Corporation, the petitioner, ordered by the Court that the appeal prayed for therein be and the same is hereby allowed. Bond in $250.00.

By The Court.

John Boyd Avis, J.

IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR PRINTING RECORD

To the Clerk of the District Court:

Please certify for printing the following portions of the Record in the above case for the appeal taken by All Continent Corporation to the Circuit Court of Appeals for the Third Circuit:

1. Relevant Docket Entries.
2. Petition of Hiram Steelman, Trustee in Bankruptcy for Stay of Litigation. Exhibit A—Subpœna in Equity. Exhibit B—Bill of Complaint in case of All Continent Corporation v. Wynn, et al. Exhibit C—Order Directing Appearance of Defendant.
3. Order to Show Cause.

4. Motion to Dismiss.
5. Opinion of Court upon Petition to Stay Litigation.
[fol. 49] 6. Decree of Court Granting Injunction.
7. Assignments of Error.
8. Petition for an Order Allowing Appeal.

Frederick H. Spotts, Riggins & Davis, Attorneys for Appellant, All Continent Corporation.

[fol. 50] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 51] IN UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT

#6253

In the Matter of WILLIAM FOX, Bankrupt;

ALL CONTINENT CORPORATION, Petitioner,

against

HIRAM STEELMAN, Trustee in Bankruptcy of William Fox, Respondent

ORDER GRANTING LEAVE TO APPEAL AND GRANTING MOTION TO INCLUDE ADDITIONAL MATTER IN RECORD, ETC.

A motion having been made herein by counsel for All Continent Corporation, for leave to appeal from a certain [fol. 52] order of the United States District Court for the District of New Jersey, dated October 7, 1936, and for leave to include in the transcript of record in said appeal certain papers and pleadings more particularly referred to in the petition of All Continent Corporation, verified *October 26, 1936*; and counsel for said Hiram Steelman, trustee as aforesaid, having interposed objections to the inclusion of said papers and pleadings in said transcript of record, and the consideration thereof on this appeal;

Upon Consideration Thereof, it is

Ordered that said motion be and hereby is in all respects granted; and it is further ordered that the inclusion, in the transcript of record, of the additional papers hereinabove referred to, shall be without prejudice to the right of the

respondent to object to the consideration of the said papers, by this Court, on the hearing of this appeal. On the statement that all parties agree hereto the same is granted.

Per Curiam. Buffington, C. J. U. S. C. J.

A true copy. Wm. Elmer Brown, Jr., Solicitor of Complainant.

IN CHANCERY COURT OF NEW JERSEY

BILL OF COMPLAINT

To the Honorable Luther A. Campbell, Chancellor of the State of New Jersey:

The complainant, Hiram Steelman, Trustee in Bank-[fol. 53] ruptcy for William Fox, a bankrupt, a resident of the City of Atlantic City, Atlantic County, New Jersey, respectfully shows that:

1. William Fox, a resident of the City of Atlantic City, Atlantic County, New Jersey, was adjudicated a bankrupt by order of the United States District Court, for the District of New Jersey, on May 29, 1936.

2. Thereafter, on June 25, 1936, Hiram Steelman, the complainant herein, was appointed Trustee of said bankrupt and his estate by Honorable Robert E. Steedle, Referee in Bankruptcy to whom said bankruptcy matter was referred, and said complainant promptly thereafter duly qualified as such trustee and thereby became entitled to receive into his possession all of the assets of said bankrupt.

3. This action is instituted herein by and with the approval of the United States District Court for the District of New Jersey, in which court said Fox was adjudicated a bankrupt as aforesaid, and the order approving same was made by said Honorable Robert E. Steedle, Referee, and entered on October 13th, 1936.

I

4. Prior to his adjudication in bankruptcy as aforesaid, and on or about October, 1930, said William Fox formed a corporation known as All Continent Corporation, which, at his instance and direction was organized under and by virtue of the laws of the State of Delaware. Said corpora-

tion was formed allegedly for the purpose of dealing in stocks and securities of various kinds and descriptions.

[fol. 54] 5. At the time of the formation and organization of said All Continent Corporation the principal business of said William Fox was that of dealing in and the buying and selling of stocks, bonds and securities of various kinds and description.

6. On or about December 23, 1930, said William Fox was possessed of stocks, bonds and various kinds of securities of the then total value of at least $6,100,000.00 and between the dates of December 23rd and December 29th, 1930, said Fox assigned, transferred and conveyed all of his said securities of the value aforesaid to All Continent Corporation. The method of making said assignment or transfer was as follows:

Said William Fox on six different occasions between the dates aforesaid borrowed large sums of money from certain brokers, and at the time of each of said borrowings he deposited certain of the aforesaid securities with said brokers as collateral security for the respective loans. The total amount borrowed was approximately $6,100,000. Each time that said Fox had borrowed from said brokers he in turn gave the sum so borrowed to All Continent Corporation and with said money said All Continent Corporation purchased the securities which said Fox had deposited with said brokers, thus satisfying the debt of said Fox, and then and there, it, the said All Continent Corporation, is alleged to have taken said securities into its possession, thus acquiring all of the securities which he, the said Fox, theretofore owned of the aggregate total value of $6,100,000. as aforesaid.

7. In addition to the assignment and transfer of the aforesaid securities to said All Continent Corporation, said William Fox at or about the same time assigned to said All [fol. 55] Continent Corporation certain credits which he then owned and to which he was entitled from other brokers of the aggregate value of approximately $850,000.

8. In return for the assignment and transfer of said securities and said brokers' credits said All Continent Corporation issued and delivered to said Fox all of its capital stock, without additional consideration, so that said Fox then and there became the sole owner of said corporation.

9. Promptly after the assignment and transfer of said securities and brokers' credits to said All Continent Corporation as aforesaid, said All Continent Corporation directed that all of its assets consisting of stocks, bonds and other securities should be delivered and turned over to said William Fox, and immediately after he, the said Fox, had acquired possession thereof, he deposited said securities in his personal safe deposit box which was then and there and thereafter continued to be registered in his personal name and over which he alone had control. Said Fox alone had the right of access to said safe deposit box and to said securities deposited therein even to the exclusion of said All Continent Corporation or any qualified officer or director of it.

10. Also promptly after the transfer of said securities by said Fox to said All Continent Corporation and promptly after the assignment by him of said brokers' credits as aforesaid, All Continent Corporation executed and delivered to said William Fox power of attorney with broad and general powers and authority to sell the assets of said All Continent Corporation, reinvest all proceeds thereof, and [fol. 56] to do every manner of thing with said assets that he might do if they were his own.

11. Said William Fox and Eva Fox, his wife, claim to have entered into agreement on or about January 28, 1931, whereby he, the said William Fox, transferred and conveyed all of the capital stock of said All Continent Corporation consisting of 69,400 shares of Series "A" of the preferred stock and 1,000 shares of common stock to said Eva Fox, the wife of William Fox, as aforesaid, for the benefit of her, the said Eva Fox, during her lifetime and thereafter for the benefit of Belle Fox and Mona Fox, daughters of said William Fox, and ultimately for the benefit of the grandchildren of said William Fox, namely, William Fox Tauszig and William Fox Schwartz. A copy of said trust indenture is attached hereto, marked Exhibit "A" and by this reference is made a part hereof. Said William Fox Tauszig is the son of said Mona Fox and said William Fox Schwartz is the son of said Belle Fox.

12. Said William Fox Tauszig and William Fox Schwartz are infants under the age of fourteen years and are living and residing with their said parents respectively.

13. Said trust indenture was not delivered to said Eva Fox at or about the time it was allegedly made and executed and was not delivered to said Eva Fox for a long time thereafter, if at all.

14. The preferred and common stock of said All Continent Corporation which is the subject of said alleged trust indenture was not delivered to said Eva Fox, trustee, at or about the time said trust indenture was allegedly made [fol. 57] and executed, nor was said stock physically delivered to said trustee for a long time thereafter, if ever.

15. Said preferred and common stock which was the subject of said trust indenture has at no time been transferred on the books of said All Continent Corporation from the name of said William Fox to said Eva Fox, either personally or as trustee, and said stock ever since originally issued has continued to be registered on the books of said All Continent Corporation in the name of said William Fox and still is at this time so registered and recorded.

16. Ever since the formation and organization of said All Continent Corporation, the assets of said corporation have at all times been either in the possession or under the control and domination of said William Fox. All of said assets of All Continent Corporation which were not on deposit with stock brokers with whom said Corporation did business, were at all times in the possession of said Fox and kept by him in a safe deposit box registered in his individual name over which he alone had access and control until sometime during the year 1933, when said Fox made the necessary arrangements to give one Benjamin Reass, President of said All Continent Corporation and the personal attorney of said Fox, and Herbert Leitstein the Treasurer of said All Continent Corporation and personal secretary of said Fox, joint access to said safe deposit box with him, the said Fox.

17. The said William Fox managed, dominated and controlled the affairs of said All Continent Corporation from the time of its formation and organization as aforesaid and continuously thereafter.

[fol. 58] 18. From the time of its formation and organition said All Continent Corporation purchased, sold and dealt in stocks, bonds and securities of various kinds for the purpose of investment only. It at no time purchased, sold

or dealt in stocks, bonds and securities or other investments for or on account of any person other than itself or said William Fox, individually or acting in its guise as a corporate entity.

19. Said All Continent Corporation at the behest and direction of said William Fox opened accounts with certain stock brokers in and about the City of New York and elsewhere with whom the said Fox had theretofore and was then doing business. Said All Continent Corporation maintained said brokerage accounts in its own name as well as in the names of third parties. Said third party accounts with said brokers were in the same name as third party accounts which were kept and maintained with said brokers by said William Fox for and on his own account and particularly is that true with respect to a third party account maintained in the name of Ben Leo, who is a brother-in-law of said Fox.

20. On many and numerous occasions after the time when said Fox had allegedly assigned and transferred said stocks, bonds and other securities, as well as said brokers' credits to said All Continent Corporation, he, the said Fox, dealt with said assets of said Corporation as though they were his own and for his own personal benefit and gain.

21. Said All Continent Corporation at frequent times throughout the entire period of its existence, has made numerous disbursements for and on the account of the bankrupt and various other corporations owned and con- [fol. 59] trolled by him and the major portion of the transactions of said Corporation were transactions in which the bankrupt or the corporations which he owned were involved.

22. The business office of said All Continent Corporation was the office of said William Fox and the expense of the rental and maintenance of said office for the period from the time of the organization of said corporation until January 1, 1936, at least, was paid by said Fox from his personal funds.

23. Said William Fox employed one Herbert Leitstein as his personal secretary, and said Leitstein was the person charged with the keeping of the books and records of said Fox. Said Leitstein has also been in charge of the keeping

of the books and records of said All Continent Corporation from the time of its organization until now. The salary of said Leitstein throughout that entire period until January 1, 1936, was paid by said Fox from his personal funds and no part thereof was paid by All Continent Corporation. Since January 1, 1936, it is alleged that the salary of said Leitstein has been paid by said All Continent Corporation. Said Leitstein the personal secretary and bookkeeper of said Fox also was the treasurer of said All Continent Corporation from the time of its organization until sometime during the latter part of the year 1935.

24. Said William Fox from a period dating prior to the formation and organization of said All Continent Corporation and continuously until now has had as his personal attorneys a firm of lawyers known as Hirsh, Newman, Reass and Becker, who maintain offices in the City of New [fol. 60] York. Said firm of attorneys has also continued to be the attorneys of said All Continent Corporation from the date of its organization until now. Said firm of attorneys have for some years past, also acted as attorneys for said Eva Fox, Mona Fox and Belle Fox. Also complainant is informed from such source that he believes it to be true, that said firm of attorneys actively participated in all the things herein complained of and particularly those which resulted in the transfer of the assets and property of said Fox from him to said All Continent Corporation. Benjamin Reass, Esq., a member of the said firm of attorneys, acted as President of said All Continent Corporation from the time of its organization until sometime during the latter part of the year 1935 and other members of said firm did at various times throughout said period act as officers of said corporation.

25. From the time of the formation and organization of All Continent Corporation down until the present time its business has been confined to holding of securities and assets originally transferred to it by said Fox, to transactions dealing in these securities and others purchased from time to time out of the funds realized from the sale of the original securities and from moneys borrowed thereon. In addition thereto said Corporation has been used as a conduit or medium for the business transactions of said William Fox himself as well as other corporations which he owned and controlled.

26. Said All Continent Corporation paid no salary or compensation of any kind to said William Fox for the services which he rendered to it throughout the period of its existence.

[fol. 61] 27. No payments of money were made to said Eva Fox, the wife of said William Fox, from the income received from said alleged trust created by him from the time of the creation thereof until December 30, 1935, at which time she, the said Eva Fox, is alleged to have received the sum of $25,000.00 salary for services rendered by her during the year 1935. No provision for the payment of said sum was made by said All Continent Corporation prior to December, 1935.

28. Said William Fox heretofore organized certain other corporations of which he was either the sole owner or over which he exercised complete control. Said all Continent Corporation from time to time during its existence received certain moneys from said other corporations of said William Fox and also paid out moneys to them and for their account and also for the account of said Fox. The major portion of all the business done by the said All Continent Corporation was in connection with transactions with and for the bankrupt, with and for the corporations which he owned and controlled, or related to purchase and sale of securities which the corporation received from the bankrupt or which it permitted him to keep and deal with as though they were his own property.

29. A complete and thorough knowledge of the assets, liabilities and affairs of said William Fox can only be acquired by and through an audit or examination of the books and records of said William Fox in conjunction with the books and records of said All Continent Corporation.

30. The cash book of All Continent Corporation reveals that of a total of slightly more then $13,000,000. that has [fol. 62] been disbursed by said Company since its organization over $12,000,000. has been disbursed in connection with transactions with or for said William Fox, or the companies which he owns and controls.

31. During the course of the operation of the affairs of said All Continent Corporation from the time of its organization until December, 1935, it is alleged that William Fox became indebted to said All Continent Corporation by

reason of certain advances which were made by said Corporation to him in the aggregate amount of approximately $1,322,258.19 for which said Fox is alleged to have given to said All Continent Corporation his personal note secured by collateral consisting of stocks, bonds, securities and investments of various kinds and description.

32. At or about August, 1935, Eva Fox, the wife of said William Fox, Belle Fox and Mona Fox, daughters of said William Fox, are alleged to have become the directors of said All Continent Corporation. Also at or about said time said Eva Fox became President and Treasurer, Mona Fox became Secretary and Belle Fox became Vice President of said All Continent Corporation.

33. In the month of December, 1935, the collateral note of said William Fox given to said All Continent Corporation as aforesaid was foreclosed by the sale of all of the collateral security which had been deposited therewith and as a result of said sale said All Continent Corporation is alleged to have become possessed of all of said collateral security which theretofore belonged to said William Fox.

[fol. 63] 34. On February 2, 1936, said William Fox entered into agreement with said All Continent Corporation whereby it is alleged that he sold and conveyed certain property and assets enumerated therein to said All Continent Corporation, a true copy of said agreement is attached hereto, marked Exhibit "B" and by this reference is made a part hereof.

35. On May 23, 1936, said William Fox entered into agreement with said All Continent Corporation whereby it is alleged that he, the said Fox, conveyed and transferred to said All Continent Corporation certain shares of Building and Loan stock enumerated therein, which were theretofore the property of said William Fox, and that thereby said All Continent Corporation became the owner and possessor thereof. A true copy of said agreement is attached hereto, marked Exhibit "C" and by this reference made a part hereof.

36. By virtue of the sale of said collateral security and the transfer of property enumerated in agreements Exhibits "B" and "C" attached hereto, said William Fox was divested of all property of every kind and description which was of any importance or value, and he was thereby denuded

of all the vast wealth of which he had theretofore been possessed and which he had theretofore enjoyed.

37. In and by the voluntary petition in bankruptcy which was filed by said William Fox resulting in his adjudication as a bankrupt, said Fox listed liabilities in the aggregate amount of $9,535,261.91 and assets of a total or aggregate value of $1,590,000. Of said liabilities it is averred in said schedules that said Fox is indebted to said All Continent. [fol. 64] Corporation in the total sum of $417,258.19. Said averment in said schedules is incorrect and in error and said William Fox in not indebted to said All Continent Corporation in any amount. Of said total assets shown in said schedules, said William Fox represents that he is possessed of real estate of the total aggregate value of $1,400,000., of bills, promissory notes and securities of the total value of $190,000. and of cash on hand in the total sum of $100. The real estate which said Fox avers to be the value of $1,400,000. is referred to in his said schedules in the following manner. "Undivided one-half interest in property located on Market Street, in the City of San Francisco, State of California, owned by the petitioner, together with Capital Company, a California corporation, the other one-half undivided interest being owned by the Capital Company, a California corporation. The said undivided one-half interest of petitioner being subject to a deed of trust given to secure the payment of moneys loaned to the petitioner in connection with the acquisition of this property. The said deed of trust is a lien on the undivided one-half interest of your petitioner in the sum of $470,000. with interest. Estimated value of undivided one-half interest of petitioner which was acquired at an original cost of approximately $1,400,000. over and above the liens, mortgages and encumbrances thereon, and subject to the community interest of Eva Fox, as wife, is subject to possible defeasance of petitioner's title to foregoing real estate by reason of a purported sale thereof, under a deed of trust thereon, held on May 11, 1936, which sale petitioner claims was illegal and in violation of his rights." It is doubtful whether or not said William Fox is the owner of said interest in said real estate as alleged by him and it is also doubtful whether or not said real estate is of the value [fol. 65] alleged, and in order to determine the interest of said Eva Fox in said real estate it is necessary that liti-

gation be instituted in the State of California for the purpose of determining said ownership and the value thereof. The bills, promissory notes and securities which are listed in the said bankruptcy schedules of a total $190.00. consist of four notes of one C. H. Huston, all of which are long over due and the value of said notes is very doubtful. In fact complainant herein is informed that said Huston is at present time without property or means from which said indebtedness might be recovered, and also complainant has been unable thus far to ascertain the whereabouts of said Huston. A careful analysis of the schedules of said bankrupt, William Fox, discloses that at the time of the filing thereof and his adjudication in bankruptcy, he the said Fox, was to all intents and purposes without property of any value from which his various debts and liabilities might be paid and satisfied.

38. Complainant avers that said All Continent Corporation was formed and organized by said William Fox for the express purpose of defrauding his creditors then existing as well as those to whom said Fox thereafter became indebted.

39. Complainant further avers that said William Fox and said All Continent Corporation are one and the same.

40. Complainant also avers that the real object sought to be attained by said William Fox in the formation and organization of said All Continent Corporation was to thwart Fox's creditors and to retain for himself and his family in fraud of his creditors the full and unmolested enjoyment of all his assets.

[fol. 66] 41. Complainant further avers that said William Fox formed and organized All Continent Corporation and used its corporate form for the purpose of evading the law and perpetrating a fraud upon his creditors existing at the time of the formation thereof as well as those to whom he thereafter became indebted and that the legal entity of said corporation was interposed by him so as to defeat justice.

42. Complainant further avers that the formation and organization of said All Continent Corporation, and the transfer and assignment of assets by said Fox to said Corporation in return for the issuance and delivery of the capital stock of said Corporation to said Fox, the making of

said trust indenture by said Fox to said Eva Fox, trustee, the foreclosure sale of the collateral of said William Fox, deposited in connection with the note which said Fox delivered to said All Continent Corporation, the assignment and transfer by said Fox of the securities named in said agreement of February 3, 1936, the transfer and assignment by said Fox to said Corporation of the assets named in said agreement of May 23, 1936, as well as all of the other things done by and between said Fox and said All Continent Corporation as hereinbefore enumerated and set out, were each and every one of them a part of a general scheme or plan devised and put into effect by said William Fox in order to hinder, delay and defraud his creditors and to retain for himself and his family in fraud of his creditors the full and unmolested enjoyment of all his assets.

43. Complainant further avers that Eva Fox, the wife of the bankrupt, and Belle Fox and Mona Fox, daughters of said bankrupt, were in full and complete knowledge at all times of the things done as herein complained about [fol. 67] and they, the said Eva Fox, Belle Fox and Mona Fox either sat by and permitted said things to be done by said William Fox or assisted in the doing thereof all in fraud and to the damage of the creditors of said William Fox, and particularly is this so in connection with the organization of said All Continent Corporation, the creation of the alleged trust of the capital stock of said All Continent Corporation, the use of said All Continent Corporation for the personal benefit and gain of said William Fox, the foreclosure sale of the collateral of said Fox deposited with the note which said Fox had delivered to said All Continent Corporation and the transfer of the assets of said Fox by means of the said agreements of February 3rd and May 23rd, 1936.

44. Complainant further avers that as a result of the transfer by said Fox to said All Continent Corporation of assets which theretofore were owned by him and which transfer was made between the dates of December 23rd and December 29th, 1930, and the assignment to said All Continent Corporation of said brokerage credits at or about the same time, and also as a result of said trust indenture dated January 28, 1931, said William Fox became insolvent and thereafter continued to be insolvent.

45. Complainant further avers that none of the attempted transfers and assignments of assets by said William Fox to said All Continent Corporation were ever completely and legally consummated and this is particularly so insofar as the attempted assignment and transfer of December, 1930, the assignment to Eva Fox, trustee, in January, 1931, the sale of the collateral of said William Fox is December, 1935, and the assignment by virtue of the agreements dated February 3rd and May 23rd, 1936, are concerned.

[fol. 68] 46. Said All Continent Corporation maintains its business office in the City of Atlantic City, Atlantic County, New Jersey, and all of its books of account, records and property of every kind and description are maintained there. Said William Fox, Eva Fox, Belle Fox and Mona Fox are all residents of said Atlantic City.

II

47. Some time prior to the adjudication of said Fox as a bankrupt as aforesaid he assigned, transferred and conveyed certain real estate belonging to him and situate at Woodmere, Long Island, in the State of New York, to said Eva Fox, his wife. Said real estate was of considerable extent and of great value.

48. Both said Fox and Eva Fox, his wife, claim and allege the transfer of said Woodmere properties took place on or about April 14, 1930. However, complainant is informed from such source that he believes it to be true and therefore avers that the said transfer was not had and consummated at or about said time but in fact was consummated at a much later date, if at all.

49. Also it is claimed and alleged by said Fox that on or about August 20, 1931, he paid and satisfied a certain mortgage debt or obligation amounting to the sum of $20,000 which was a lien upon the aforesaid Woodmere property and that the payment thereof occurred after the transfer of said property to said Eva Fox. The sum so required to pay off and satisfy said mortgage was paid by said Fox from his personal funds.

50. Said Fox also claims and alleges that on or about [fol. 69] January 8, 1931, he assigned and transferred to said Eva Fox, his wife, 500 shares of the preferred stock

of Aronberg Fried Company and 200 shares of the stock of Whip-Poor-Will Corporation which theretofore belonged to and was owned by him and which said stocks then and there were of great value.

51. Also it is claimed and alleged by said Fox that on or about August 5, 1931, he assigned and transferred to said Eva Fox, his wife, 857 shares of the stock of Fox Westwood Corporation and 750 shares of Fox Hills Corporation which theretofore belonged to and was owned by him and which said stocks then and there were of great value.

52. Said Fox also alleges and claims that on or about January 4, 1933, he withdrew from his personal funds the sum of $32,684.00 with which he paid for and purchased 327 shares of the stock of Fox Westwood Corporation which were allegedly issued and delivered to said Eva Fox the wife of said William Fox, at some time during the year 1932.

53. Said Fox alleges and claims that said assignments and transfers and all of the things set out in the foregoing paragraphs hereof numbered 47 to 52, both inclusive, were intended to be and were in fact gifts from him to his said wife.

54. Said assignments and transfers of said property, money and stocks made by said Fox to Eva Fox, his wife, were made without any real, valuable or adequate consideration passing from her to him.

55. Said assignments and transfers were not in fact made at the times alleged and claimed by said Fox but were in fact made at much later times.

[fol. 70] 56. Also this complainant is informed and believes and therefore avers that said assignments and transfers were not in fact completely made and fully consummated.

57. Complainant also avers that said alleged assignments and transfers were made by said Fox to his said wife for the express purpose of defrauding his creditors then existing as well as those to whom he thereafter became indebted; that the real object sought to be attained by said Fox in making said assignments and transfers to his said wife was to thwart his creditors and to retain to himself and to his

said wife the full and unmolested enjoyment of said assets and property in fraud of his creditors existing at the time and those to whom he thereafter became indebted; that said assignments and transfers so made as aforesaid by said Fox to his said wife were made in covinous agreement between him and her to hinder, delay and defraud the creditors of said William Fox and to retain for himself and his said wife the full and unmolested enjoyment of all his assets in fraud of his creditors then existing and those to whom he thereafter became indebted; that said Fox made said assignments and transfers at a time when he was insolvent and unable to pay and satisfy his just debts and obligations; that as a result of said assignments and transfers, he, the said William Fox, became insolvent and particularly is this true by reason of the transfer of the assets of said Fox to said All Continent Corporation at or about the same time as said assignments and transfers were made to said Eva Fox as set out in the first part of this bill of complaint; and that said assignments and transfers were each and every one of them, a part of a general scheme or plan devised and put into effect by said William Fox in order to [fol. 71] hinder, delay and defraud his creditors and to retain to himself and his said wife and other members of his said family the full and unmolested enjoyment of all his assets in fraud of his creditors then existing as well as those to whom he thereafter became indebted.

III

58. Also some time prior to the adjudication of said Fox as a bankrupt as aforesaid he claims to have assigned and transferred to Belle Fox, his daughter, 905 of the voting trust certificates of Bankers Security Corporation and 70 shares of the common stock of said Bankers Security Corporation which said assignment or assignments, transfer or transfers are alleged to have taken place at or about January 1931.

59. Also said Fox claims to have paid and turned over to said Belle Fox the sum of $200,000.00 in cash withdrawn from his personal funds and that said payment was made at or about January, 1932.

60. Sometime during the years 1928 and 1929 said Fox also alleges and claims that he assigned and transferred to

said Belle Fox, his daughter, 160 shares of the preferred stock of said Bankers Security Corporation which theretofore belonged to and was owned by him.

61. Said Fox alleges and claims that said assignments and transfers and all of the things set out in the foregoing paragraphs hereof numbered 58 to 60, both inclusive, were intended to be and were in fact gifts from him to his said daughter, Belle Fox.

62. Said assignments and transfers of said property and money by said Fox to Belle Fox, his daughter, were made [fol. 72] without any real, valuable or adequate consideration passing from her to him.

63. Said assignments and transfers were not in fact made at the times alleged and claimed by said Fox but were in fact made at much later times.

64. Also this complainant is informed and believes and therefore avers that said assignments and transfers were not in fact completely made and fully consummated.

65. Complainant also avers that said alleged assignments and transfers of property and money were made by said Fox to his said daughter, Belle Fox, for the express purpose of defrauding his creditors then existing as well as those to whom he thereafter became indebted; that the real object sought to be attained by said Fox in making said assignments and transfers to his said daughter was to thwart his creditors and to retain to himself and to his said daughter the full and unmolested enjoyment of said assets and property in fraud of his creditors existing at the time and those to whom he thereafter became indebted; that said assignments and transfers so made as aforesaid by said Fox to his said daughter were made in covinous agreement between him and her to hinder, delay and defraud the creditors of said William Fox and to retain for himself and his said daughter the full and unmolested enjoyment of all his assets in fraud of his creditors then existing and those to whom he thereafter became indebted; that said Fox made said assignments and transfers at a time when he was involvent and unable to pay and satisfy his just debts and obligations; that as a result of said assignments and transfers he, the said William Fox, became insolvent and particularly is this true by reason of the transfer of the assets

[fol. 73] of said Fox to said All Continent Corporation at or about the same time as said assignments and transfers were made to said Belle Fox as set out in the first part of this bill of complaint; and that said assignments and transfers were, each and every one of them, a part of a general scheme or plan devised and put into effect by said William Fox in order to hinder, delay and defraud his creditors and to retain to himself and his said daughter and other members of his said family the full and unmolested enjoyment of all his assets in fraud of his creditors then existing and those to whom he thereafter became indebted.

IV

66. Also some time prior to the adjudication of said Fox as a bankrupt as aforesaid he claims to have assigned and transferred to Mona Fox, his daughter, 160 shares of the preferred stock of Bankers Security Corporation which said assignment and transfer is alleged to have taken place during the years 1926 and 1929.

67. Also said Fox claims to have paid and turned over to said Mona Fox the sum of $139,500.00 in cash withdrawn from his personal funds and that said payment was made at or about March 2, 1932.

68. Said Fox alleges and claims that said assignments and payment of money set out in the foregoing paragraphs hereof numbered 66 and 67, both inclusive, were intended to be and were in fact gifts from him to his said daughter, Mona Fox.

69. Said assignments and transfer of property and money by said Fox to said Mona Fox, his daughter, were made [fol. 74] without any real, valuable or adequate consideration passing from her to him.

70. Said assignments and transfers of property and money were not in fact made at the times alleged and claimed by said Fox but were in fact made at much later times.

71. Also this complainant is informed and believes and therefore avers that said assignments and transfers of property and money were not in fact completely made and fully consummated.

72. Complainant also avers that said alleged assignments and transfers of property and money were made by said Fox to his said daughter, Mona Fox, for the express purpose of defrauding his creditors then existing as well as those to whom he thereafter became indebted; that the real object sought to be attained by said Fox in making said assignments and transfers to his said daughter was to thwart his creditors and to retain to himself and to his said daughter the full and unmolested enjoyment of said assets and property in fraud of his creditors existing at the time and those to whom he thereafter became indebted; that said assignments and transfers so made as aforesaid by said Fox to his said daughter were made in covinous agreement between him and her to hinder, delay and defraud the creditors of said William Fox and to retain for himself and his said daughter the full and unmolested enjoyment of all his assets in fraud of his creditors then existing and those to whom he thereafter became indebted; that said Fox made said assignments and transfers at a time when he was insolvent and unable to pay and satisfy his just debts and obligations; that as a result of said assignments and transfers he, the said William Fox, became insolvent and par-
[fol. 75] ticularly is this true by reason of the transfer of the assets of said Fox to said All Continent Corporation at or about the same time as said assignments and transfers were made to said Mona Fox as set out in the first part of this bill of complaint; and that said assignments and transfers were each and every one of them, a part of a general scheme or plan devised and put into effect by said William Fox in order to hinder, delay and defraud his creditors and to retain to himself and his said daughter and other members of his said family the full and unmolested enjoyment of all his assets in fraud of his creditors then existing and those to whom he thereafter became indebted.

73. Complainant has not a complete, adequate and safe remedy at law in the premises.

Prayer

Wherefore, Complainant prays:

1. That All Continent Corporation, William Fox, Eva Fox, Belle Fox, Mona Fox, William Fox Tauszig and Wil-

liam Fox Schwartz, who are the defendants to this suit may answer this bill of complaint and each statement therein made;

2. That the said defendants may make discovery of what property and assets said All Continent Corporation owns and possesses or to which it is entitled, the character and nature thereof, its probable value, and where the same may be found;

3. That said All Continent Corporation may be decreed to be the alter ego of said William Fox and that said All Continent Corporation and said William Fox are one and the same;

[fol. 76] 4. That all of the assets of said All Continent Corporation may be decreed to be the assets and property of said William Fox;

5. That said All Continent Corporation may be decreed to hold all of the assets and property claimed to be owned by it and standing in its name, in trust for said William Fox, bankrupt, and/or this complainant, Trustee in bankruptcy for said William Fox, bankrupt;

6. That said assignment and transfer of assets and property made by said William Fox to said All Continent Corporation between the dates of December 23rd and 29th, 1930, in the manner hereinbefore set forth, as well as the assignment and transfer of said brokers' credits at or about the same time, may be set aside and held to be fraudulent and declared to be null and void and of no effect as against the creditors of said William Fox and this complainant;

7. That said indenture of trust dated January 28, 1931, may be set aside and held to be fraudulent and declared null and void and of no effect as against the creditors of said William Fox and this complainant;

8. That the sale of the collateral which said Fox deposited with his said note with said All Continent Corporation which sale took place in the month of December, 1935, and by which said All Continent Corporation became possessed of said collateral and thereby claims to be the owner thereof, may be set aside and held to be fraudulent and declared to be null and void and of no effect as against the creditors of said William Fox and this complainant;

9. That the assignment and transfer of the property [fol. 77] and assets enumerated in said agreements dated February 3, 1936, and May 23rd, 1936, may be set aside and held to be fraudulent and declared to be null and void and of no effect as against the creditors of said William Fox and this complainant;

10. That said All Continent Corporation may be enjoined and restrained from selling, assigning, transferring, mortgaging or otherwise disposing of or encumbering said assets and that said injunction and restraint shall date from the time of the filing of this bill of complaint and to remain in full force and effect until the further order of this Court or until the matters and things in issue herein shall be finally determined;

11. That this Court shall appoint a receiver to take and hold in his possession all of the assets of said All Continent Corporation wherever the same may be found and whatever the same may be, to manage, control and preserve the same under the supervision of this Court from the time of the filing of this bill of complaint, or as soon thereafter as his appointment can be made, until the matters and things here in issue can be finally determined;

12. That said defendants, Eva Fox, Belle Fox and Mona Fox, may make discovery concerning any and all property or thing of value which may have heretofore been assigned or transferred by said William Fox to them or either of them;

13. That all the assets and property herein alleged or claimed to have been assigned and transferred by said William Fox to said defendants, Eva Fox, Belle Fox and Mona Fox, may be decreed to be the assets and property of said William Fox;

[fol. 78] 14. That said Eva Fox, Belle Fox and Mona Fox, either or all of them, may be decreed to hold all of the assets and property claimed to have been assigned and transferred to them by said William Fox as herein alleged, in trust for said William Fox, bankrupt, and/or this complainant, Trustee in bankruptcy for said William Fox, bankrupt;

15. That the said assignments and transfers of the assets and property of said William Fox to said defendants,

Eva Fox, Belle Fox and Mona Fox as hereinbefore set forth may be set aside and held to be fraudulent and declared to be null and void and of no effect as against the creditors of said William Fox and this complainant;

16. That said Eva Fox, Belle Fox and Mona Fox may be enjoined and restrained from selling, assigning, transferring, mortgaging or otherwise disposing of or encumbering any of the assets and property so assigned and transferred by said William Fox to them and each of them as hereinbefore set forth and that said injunction and restraint shall date from the time of the filing of this bill of complaint and to remain in full force and effect until the further order of this Court or until the matters and things in issue herein shall be fully determined;

17. That this Court shall appoint a receiver to take and hold in his possession all of the assets and property now in the possession of or claimed to be owned by said defendants, Eva Fox, Belle Fox and Mona Fox, all or either of them, by reason of the alleged assignment and transfer thereof to them by said William Fox as aforesaid, wherever the same may be found or whatever the same may be, [fol. 79] to manage, control and preserve the same under the supervision of this Court from the time of the filing of this bill of complaint or as soon thereafter as his appointment can be made, until the matters and things here in issue can be finally determined;

18. That a writ of subpœna may issue commanding said defendants to answer this bill of complaint and to abide by such decree as this court may make in the premises;

19. That this complainant may have such other relief in the premises as this Court may deem just and proper.

Wm. Elmer Brown, Jr., Solicitor for and of Counsel with Complainant.

EXHIBIT "A" TO BILL OF COMPLAINT

William Fox, Executive Offices, Fox Studio Building

West 55th Street, New York

Office of Herbert Leitstein, Auditor

This indenture made this 28th day of January, 1931, between William Fox, residing at 270 Park Avenue, Borough

of Manhattan, City and State of New York (hereinafter called the "Grantor") and Eva Fox, residing at 270 Park Avenue, Borough of Manhattan, City and State of New York (hereinafter called the "Trustee")

[fol. 80] Witnesseth

That the Grantor in consideration of the sum of One Dollar, to him in hand paid by the Trustee, the receipt whereof is hereby acknowledged, and the covenants hereinafter contained, hath sold, assigned, transferred and set over and by these presents doth sell, assign, transfer and set over unto the Trustee the securities and property specified and described in a schedule hereto annexed and marked "Schedule A" (hereinafter sometimes referred to as the "Trust Estate") the receipt of which securities and property is hereby acknowledged by the Trustee.

To Have and to Hold the said Trust Estate to the said Trustee upon the following express trust and conditions and with the powers and limitations hereinafter conferred and set forth, that is to say

I

(A) To collect the income on the Trust Estate and to retain the same after deducting all proper charges and expenses for her own use and benefit during her lifetime.

(B) During her lifetime to divide the said Trust Estate into two equal and separate parts, the first to be known as and is hereinafter called the First Trust Fund and the second to be known as and is hereinafter called the Second Trust Fund.

(C) Upon on the death of the Trustee the First Trust Fund shall be sold, transferred, assigned and set over to Mona, daughter of the Grantor as Substituted Trustee for the following purposes and subject to the following conditions

[fol. 81] (1) To collect the income thereon and to retain same after deducting all proper charges and expenses for her own use and benefit during her lifetime. Upon her death the said First Trust Fund together with any accumulated income thereon shall be paid and transferred to William Fox Tauszig, grandson of the Grantor, absolutely.

(2) In the event that Mona shall die before the said William Fox Tauszig has attained his majority then in

that event the said First Trust Fund shall, upon the death of Mona, be held in trust by the then guardian of the said William Fox Tauszig during the latter's minority, the income thereon to be used for the education and maintenance of the said William Fox Tauszig during his minority. The said First Trust Fund and any accumulated income thereon shall be paid and transferred to William Fox Tauszig absolutely upon attaining his majority. If the said William Fox Tauszig shall fail to attain his majority then upon his death, or if he shall predecease Mona, then upon the death of Mona the said First Trust Fund shall be paid and transferred to the descendants, if any, of the said William Fox Tauszig, then surviving, and if there be none then to William Fox Schwartz.

(3) If Mona predeceases Eva Fox the Trustee herein, the First Trust Fund shall upon the death of the said Trustee be assigned and set over to the then guardian of the aforesaid William Fox Tauszig and distributed for his benefit as provided in paragraph I (C) subdivision (2) hereof.

(D) Upon the death of the Trustee, the Second Trust Fund shall be sold, transferred, assigned and set over to Belle, daughter of the Grantor, as Substituted Trustee [fol. 82] thereof for the following purposes and subject to the following conditions:

(1) To collect the income thereon and to retain the net income thereon after deducting all proper charges and expenses during her lifetime for her own use and benefit. Upon her death, the said Second Trust Fund together with any accumulated income thereon shall be paid and transferred to William Fox Schwartz, grandson of the Grantor, absolutely.

(2) In the event that Belle shall die before the said William Fox Schwartz has attained his majority then in that event the said Second Trust Fund shall, upon the death of Belle, be held in trust by the then guardian of the said William Fox Schwartz during the latter's minority, the income thereon to be used for the education and maintenance of the said William Fox Schwartz during his minority. The said Second Trust Fund and any accumulated income thereon shall be paid and transferred to William Fox Schwartz absolutely, upon attaining his majority. If the

said William Fox Schwartz shall fail to attain his majority, then upon his death, or if he shall predecease Belle, then upon the death of Belle the said Second Trust Fund shall be paid and transferred to the descendants, if any, of the said William Fox Schwartz, then surviving, and if there be none then to William Fox Tauszig.

(3) If Belle predeceases Eva Fox the Trustee herein, the Second Trust Fund shall upon the death of the said Trustee be assigned and set over to the then guardian of the aforesaid William Fox Schwartz and distributed for his benefit as provided in paragraph I (D) subdivision (2) hereof.

[fol. 83] (E) It is the intention of the Grantor that during any one year the then life beneficiary of the first and second trust fund shall receive as income thereon the sum of at least $50,000. If, therefore, during any one year the income received does not equal the sum of $50,000. from either trust fund then the life beneficiary during said year may, if she so desires, receive an amount of principal from said trust fund which together with the income on said trust fund for said year would equal $50,000.

II

The Trustee Eva Fox is expressly authorized and empowered, though not required, to retain any and all securities and property transferred to her hereunder or hereafter received by her with full power and authority to change investments and to invest and reinvest the principal in such stocks, bonds and property as she in her discretion may determine and whether or not the same be authorized by law for the investment of trust funds.

III

The Grantor shall have the right at any time and from time to time to assign, transfer, deliver or deposit with the Trustee additional securities or property which thereupon shall become a part of the trust estate and subject in every way to the trust and the terms and conditions of this indenture.

IV

The Trustee (including the substituted trustees and any other persons who may at any time perform the functions

of a trustee or guardian of any minor hereunder) shall have full power to do the following:

[fol. 84] (A) To retain any and all real property hereafter conveyed and made part of the trust estate and to lease and release the same from time to time and to collect the rents therefrom with full power and authority to dispose of such property or any part thereof, at public or private sale, and upon such terms and conditions as to cash or credit or otherwise as the said Trustee shall deem proper and advisable, and to execute, acknowledge and deliver the necessary and proper deed or deeds for transfer to the purchaser or purchasers thereof; to consent to and enter into an agreement for the voluntary partition or sale of so much of said property as the grantor may hold in common with others, or to institute a suit for partition or sale of the same, and upon any such sale or sales in partition to proceed with the execution of the necessary deed, or deeds, for the conveyance to the purchaser thereof. Said Trustee shall have the power and authority to extend any existing mortgage or mortgages and to negotiate a loan or loans upon the security of any real estate or other property forming a part of said trust, if she deems such loans necessary and advisable, and to make, execute and deliver a mortgage or mortgages as security therefor, and such other papers as may be necessary in connection therewith.

(B) In her sole discretion to cause the securities which, may, from time to time, comprise the trust fund, or any part thereof, to be registered in her name as trustee hereunder or in her own name, or in the name of her nominee, or may take and keep them unregistered, and may retain them or any part thereof in such condition that they will pass by delivery.

(C) In the discharge of her duties hereunder to employ counsel and agents and to determine and pay to them reasonable compensation and she shall be entitled to reim-[fol. 85] bursement for the same, and for such other expenses and charges as she may deem necessary and proper to incur.

(D) To deposit any trust property with any protective or reorganization committee, to delegate discretionary powers thereto, to pay such part of the expenses and compensation of such committee as the trustee may deem proper,

to accept and retain new securities in exchange for those deposited, whether or not such new securities might be considered to be in the class legal for the investment of trust funds, to vote upon any proposition or election at any meeting of stock or security holders, and to grant proxies, discretionary or otherwise to vote at any such meeting.

(E) To allocate all cash dividends to income and all stock dividends to principal.

(F) In any case where the Trustee is required to divide the trust estate into one or more trust funds or to distribute the same, to make such division or such distribution in her sole and uncontrolled discretion and the judgment of the trustee concerning the propriety thereof and the relative values for the purpose of division or distribution of the property and securities so allotted shall be binding and conclusive on all persons interested therein.

(G) To hold the Trust Estate or any part thereof in one or more consolidated funds in which the trust funds hereunder shall have undivided interests.

V

Since the trustee and the substituted trustee provided for in paragraph I hereof are life beneficiaries hereunder, such [fol. 86] trustee and substituted trustees shall not receive any compensation for personal services rendered in the administration of the trust.

VI

Neither this agreement nor any part thereof can at any time be altered, modified, revoked, cancelled or annulled.

VII

The Trustee Eva Fox by joining in the execution of this instrument signifies her acceptance of the trust.

VIII

It is mutually agreed that these presents shall extend to and be obligatory upon the executors, administrators, legal representatives and assigns of the parties hereto.

This instrument is made in duplicate, each of which is an original but both together shall be deemed one and the same instrument.

William Fox, Grantor. (L.S.) Eva Fox, Trustee. (L.S.)

STATE OF NEW YORK,
County of New York, ss:

On this 28th day of January, 1931, before me personally came William Fox and Eva Fox to me known and known to me to be the individuals described in and who executed the foregoing instrument and acknowledged to me that they executed the same.

C. S. Leon, Notary Public. Notary Public term ex-
[fol. 87] pires March 30th, 1931. New York County Clerk's No. —. Registers No. —.

Schedule A

William Fox	69,400 shares Series A Pfd Stock of All Continent Corporation
Eva Fox	1,000 shares of Common Stock of All Continent Corporation

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EXHIBIT "B" TO BILL OF COMPLAINT

This Agreement, entered into the 3rd day of February, 1936, by and between William Fox, Hotel Claridge, Atlantic City, New Jersey, hereinafter referred to as Seller, and All Continent Corporation, a Delaware corporation, hereinafter referred to as Purchaser,

WITNESSETH:

Whereas, the Seller is the owner of lots numbered 10, 11, 24 and 25 in Block No. 30, and lots numbered 14 and 15 in Block No. 31, in "Map of Kensico Manor, Westchester County, New York, surveyed and drawn by John F. Fairchild, Civil Engineer, Mt. Vernon, New York, dated July 12, 1892", such property being free and clear, and all taxes having been paid to date; and

Whereas, the Seller is the owner and holder of a note dated December 22, 1932, made to his order by George Morton Levy, in the sum of $1,363.67, due two months after date, upon which note there is an unpaid balance of $563.67,

together with interest from December 22, 1932, to April 5, 1933 on the full amount of $1,363,67, with interest on $763.67 from April 5, 1933 to December 14, 1933, with interest on [fol. 88] $663.67 from December 14, 1933 to April 27, 1934, and with interest on $563.67 from April 27, 1934 to date; and

Whereas, the Seller is the owner of a seat on the New York Real Estate Securities Exchange, Inc.; and

Whereas, the Seller is the owner of eighty (80) shares of the capital stock of Comedy Amusement Company, Inc., which is capitalized for and has issued and outstanding, one hundred (100) shares; and

Whereas, the Seller is the owner of one hundred (100) shares of preferred and 100 shares of common stock of Woodyard Publications, Inc.; and

Whereas, the Seller is the owner of one hundred and eleven (111) shares of preferred stock of Fox Hearst Corporation; and

Whereas, the Seller is the owner of a first mortgage now reduced to the sum of $50,000 on property of Monaca Realty Co., Inc., located in Baldwin, Long Island; and

Whereas, the Seller is the owner of one hundred and eleven (111) shares of stock of Fox-Westwood Realty Company, Ltd.; and

Whereas, the aforesaid stock of Comedy Amusement Company, Inc. and Woodyard Publications, Inc., and the first mortgage on the Monaca property are now pledged as security for a loan in the sum of $20,000 from the Bankers Securities Corporation to the Seller, which loan is now past due, and under the collateral note which the Bankers Securities Corporation holds, said Bankers Securities Corpora- [fol. 89] tion is authorized to sell at public or private sale the said collateral; and

Whereas, the Seller desires to sell and the Purchaser desires to purchase from the Seller the aforesaid securities for $50,000;

Now, Therefore, the Parties Hereby Agree as Follows:

1. The Seller agrees to sell, transfer, assign, deliver and convey to the Purchaser, without recourse, and the Purchaser agrees to purchase from the Seller, for the sum of $50,000, no part to be offset against amount now due Purchaser the following assets:

(a) Lots numbered 10, 11, 24 and 25 in Block No. 30 and lots numbered 14 and 15 in Block No. 31 on "Map of Kensico Manor, Westchester County, New York."

(b) Note dated December 22, 1932, made by George Morton Levy, in the sum of $1,363.67, in favor of the Seller herein, $563.67 being the unpaid principal amount thereon.

(c) The seat on the New York Real Estate Securities Exchange, Inc.

(d) Eighty (80) shares of the capital stock of Comedy Amusement Company, Inc.

(e) One hundred (100) shares of preferred stock and one hundred (100) shares of common stock of Woodyard Publications, Inc.

(f) First mortgage now reduced to $50,000 covering property located in Baldwin, Long Island.

[fol. 90] (g) One hundred and eleven (111) shares of preferred stock of Fox-Hearst Corporation.

(h) One hundred and eleven (111) shares of stock of Fox-Westwood Realty Company, Ltd.

2. The Purchaser shall pay to the Bankers Securities Corporation, the sum of $20,000, together with interest on the note of the Seller held by the Bankers Securities Corporation, dated October 18, 1935, said interest to be paid up to the date of payment, and may deduct the total amount thus paid to Bankers Securities Corporation from the aforesaid sum of $50,000. The Purchaser at the time of payment to the Bankers Securities Corporation shall procure from the Bankers Securities Corporation the aforesaid note dated October 18, 1935, together with all of the collateral under the said note, in such form and in such manner as the Purchaser may determine to be necessary to effectuate the transfer of good title thereto from the Bankers Securities Corporation to the Purchaser herein.

3. The Purchaser shall, upon payment of the aforesaid note to the Bankers Securities Corporation, deliver the same for cancellation to the Seller herein. The Purchaser will, on or before February 15, 1936, pay to the Bankers Securities Corporation the aforesaid sum sufficient to pay the aforesaid note and interest, and shall likewise pay to the

Seller, the difference between the said amount and the sum of Fifty Thousand Dollars ($50,000). Simultaneously therewith, the Seller shall deliver to the Purchaser all necessary papers, properly to transfer to the Purchaser all of the aforesaid assets.

4. The Seller represents that the certificate for the stock of Fox Westwood Realty Company, Ltd. has been lost or [fol. 91] misplaced, and agrees that he will take such steps as may be requested by the Purchaser to cause a new certificate therefor to be issued to the Purchaser.

5. This agreement shall be binding upon and shall inure to the benefit of the parties hereto, their heirs, executors, administrators, legal representatives, successors and assigns.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

Wm. Fox. (L. S.) All Continent Corporation, by
Eva Fox. (L. S.) (Seal.)

EXHIBIT "C" TO BILL OF COMPLAINT

This Agreement entered into this 23 day of May, 1936, by and between William Fox, residing at 130 So. Delancey Place, Atlantic City, New Jersey, hereinafter called Seller, and All Continent Corporation, a Delaware corporation, with principal offices at 1616 Pacific Avenue, Atlantic City, New Jersey, hereinafter called Purchaser.

Witnesseth:

Whereas, the Seller is the owner and holder of the following building and loan shares:

(A) 125 double shares of the Southwestern Building & Loan Association, represented by book No. D5201 of the face amount of $15,000;

[fol. 92] (B) 100 double shares of the Combined Building & Loan Association, represented by books Nos. 4107D-4115D of the face amount of $24,200; now standing in the name of Joe Hart; and

(C) 100 double shares of Manufacturers & Merchants Building Loan Association, represented by book No. 4113, of the face amount of $11,400; and

Whereas, all of the said building and loan associations are now in the process of liquidation, and/or rehabilitation; and

Whereas, the Seller has been advised that the various building loan associations are restrained from making any distribution pursuant to rules promulgated by the State Banking Department of the State of Pennsylvania, by reason of which it is uncertain when and if any dividends will be paid on the aforesaid shares; and

Whereas, the Seller desires to sell, and the Purchaser desires to purchase the said shares;

Now, Therefore, the parties hereto agree as follows:

1. The Seller does hereby assign, transfer and deliver unto the Purchaser all of his right, title and interest in and to the following:

(A) 125 double shares of the Southwestern Building & Loan Association, represented by Book No. D5201, of the face amount of $15,000;

(B) 100 double shares of the Combined Building & Loan [fol. 93] Association, represented by books Nos. 4107D-4115D of the face amount of $24,200, now standing in the name of Joe Hart; and

(C) 100 double shares of Manufacturers & Merchants Building & Loan Association, represented by Book #4113 of the face amount of $11,400;

together with all of the rights which have accrued and may accrue to the Seller in accordance with the foregoing.

2. The Seller agrees that he will execute such other and further papers as may be necessary to effectuate the transfer and assignment of the said shares.

3. The Purchaser agrees that it will, within ten days from date, pay to the Seller the sum of $3,500.00 for the transfer and assignment of the aforesaid shares, no part of which shall be offset or deducted from any amount now due the Purchaser.

4. This agreement shall be binding upon, and shall inure to the benefit of the parties hereto, their heirs, executors, administrators, legal representatives, successors and assigns.

In Witness Whereof, the parties hereto have hereunto executed this agreement the day and year hereinabove first written.

William Fox, Seller. (L. S.) All Continent Corporation, by Eva Fox, Pres., Purchaser.

[fol. 94] AFFIDAVIT OF HIRAM STEELMAN

STATE OF NEW JERSEY
County of Atlantic, ss:

Hiram Steelman, of full age, being duly sworn according to law, on his oath deposes and says:

1. William Fox, a resident of the City of Atlantic City, Atlantic County, New Jersey, was adjudicated a bankrupt by order of the United States District Court, for the District of New Jersey, on May 29, 1936.

2. Thereafter on June 25, 1936, I was appointed Trustee of said bankrupt and his estate by Honorable Robert E. Steedle, Referee in Bankruptcy to whom this matter was referred, and promptly thereafter I duly qualified as such Trustee and thereby became entitled to receive into my possession all of the assets of said bankrupt.

3. Thereafter, upon petition of the Capital Company and Chicago Title and Trust Company, two of the creditors of said bankrupt, it was ordered that All Continent Corporation, a corporation of the State of Delaware, Eva Fox, the wife of the bankrupt, Belle Fox and Mona Fox, both daughters of the bankrupt, Herbert Leitstein and Joseph Hart should be examined under Section 21-a of the Bankruptcy Act of 1898. Said order directing said examination was entered in the said bankruptcy proceedings on June 23, 1936.

4. In pursuance of said order directing said examination, subpoenas were issued out of this Court directing all of said parties named in said order to appear before said Referee for examination and requiring them to produce

certain books and records. All of said subpoenas were duly served upon said parties.

5. Said examination by virtue of said order began on [fol. 95] July 6, 1936, and has been diligently conducted ever since then until now and is still in progress. Much of the testimony adduced at said examination has come from witness Herbert Leitstein. Said Leitstein has for more than twenty-five years past acted as the personal secretary of said William Fox and during all that period has been in charge of the keeping of the books of account of said Fox. Also said Leitstein has been in charge of the keeping of the books of All Continent Corporation hereinafter referred to from the time of its formation until now.

6. I have attended during most of the time that said examination of witnesses has taken place by virtue of the aforesaid order, and have had access to a transcript of the testimony taken in that connection.

7. It has been disclosed during said examination that prior to his adjudication in bankruptcy as aforesaid and on or about October, 1930, said William Fox formed a corporation known as All Continent Corporation which at his instance and direction was organized under and by virtue of the laws of the State of Delaware. Further, it has been disclosed that said corporation was formed allegedly for the purpose of dealing in stocks and securities of various kinds and description.

8. Said examination further discloses that at the time of the formation and organization of said All Continent Corporation, the principal business of said William Fox was that of dealing in and the buying and selling of stocks, bonds and securities of various kinds and description.

9. It has also been disclosed in the manner aforesaid that on or about December 23, 1930, said William Fox was [fol. 96] possessed of stocks, bonds and various kinds of securities of the then total value of at least $6,100,000.00, and between the dates of December 23rd and December 29th, 1930, said Fox assigned, transferred and conveyed all of his said securities of the value aforesaid to All Continent Corporation. Said securities were so assigned and transferred to and acquired by said All Continent Corporation in the following manner:

Prior to December 23, 1930, said securities acquired by All Continent Corporation at an alleged cost to it of $6,100,000.00 were in a vault maintained by said Fox at the Chemical Safe Deposit Company, 46th Street and Madison Avenue Branch, New York City. At that time said Fox had a brokerage account with a firm of brokers by the name of Loeb-Alsberg & Co., members of the New York Stock Exchange, maintaining their offices in the City of New York. Between December 23rd and December 29th, 1930, said Fox on six different occasions delivered to Loeb-Alsberg & Co. the above referred to securities which came out of his vault, and at the time of each deposit received from Loeb-Alsberg & Co. by way of loan various sums aggregating $6,100,000.00, for which loan said Loeb-Alsberg & Co. held the securities deposited on that day. On each day on which a loan was received by Fox from Loeb-Alsberg & Co., he, as appears from the books of account of All Continent Corporation advanced the proceeds of said loan to All Continent Corporation by way of loan. All moneys so advanced to All Continent Corporation by the bankrupt were deposited in an account in the name of All Continent Corporation with the Commercial National Bank and Trust Co. of New York City. Immediately thereafter, and on six different occasions, instructions were given to the Com- [fol. 97] mercial National Bank and Trust Co. to purchase allegedly for the account of All Continent Corporation from Loeb-Alsberg & Co. the securities held by Loeb-Alsberg & Co. as collateral for the loans advanced to said Fox. After the securities originally owned by said Fox were acquired by All Continent Corporation, All Continent Corporation directed the Commercial National Bank and Trust Co. which had possession of the said securities, to deliver the same to the said Fox at his home 270 Park Avenue, New York City. The written instructions were later changed and pursuant thereto the Commercial National Bank and Trust Co. delivered to the said Fox at the Chemical Safe Deposit Co., 46th Street and Madison Avenue Branch the aforesaid securities which were placed by said Fox in the very same vault from which the securities originally came:

10. In addition to the securities acquired by All Continent Corporation in the manner above set forth, the said Fox claims to have assigned to All Continent Corporation his equity in several brokerage accounts of the aggregate value

of $841,884.61. Thereafter, All Continent Corporation allegedly in satisfaction of the advances of $6,100,000.00 made by Fox to it and in return for the aforesaid assignment to it of equities in brokerage accounts, issued and delivered to said Fox all of its common and preferred stock consisting of 69,400 shares of Series "A" preferred stock and 1,000 shares of common stock.

11. The record of said examination further shows that the stock originally issued to said William Fox, as aforesaid, still stands in his name on the books of All Continent Corporation although it is claimed that on January 28, 1931, he transferred, conveyed and assigned all his said stock in [fol. 98] All Continent Corporation to his wife, Eva Fox, pursuant to an alleged indenture of trust, a copy of which is attached to the foregoing bill of complaint and is marked Exhibit "A".

12. This deponent is informed from such source that he believes it to be true and therefore avers that said trust indenture was not delivered to said Eva Fox at or about the time it was allegedly made and executed and was not delivered to said Eva Fox for a long time thereafter, if at all.

13. This deponent is also informed and verily believes that the preferred and common stock of said All Continent Corporation which is the subject of said alleged trust indenture was not delivered to said Eva Fox, Trustee, at or about the time said trust indenture was allegedly made and executed, nor was said stock physically delivered to said trustee for a long time thereafter, if ever.

14. The aforesaid Herbert Leitstein, Secretary of said Fox, and Treasurer of said All Continent Corporation, and keeper of the books of both, testified in said examination that he had been paid a salary of $200.00 a week or more during the period from December, 1930, until now, and that all of said salary prior to about January 1, 1936, was paid to him by said Fox as compensation for keeping his, Fox's, books, and also the books of All Continent Corporation. Subsequent to about January 1, 1936, the salary of said Leitstein was paid by All Continent Corporation for and on account of his services in keeping its books as well as the books of the bankrupt.

15. During all the period from the time of the formation of All Continent Corporation until now, the above named

bankrupt and All Continent Corporation have jointly oc
[fol. 99] cupied the same offices and the books and records both of the said bankrupt and the said All Continent Corporation were kept and retained in the same office.

16. Said All Continent Corporation was formed as aforesaid for the purpose of dealing in securities and investments of all kinds and descriptions and particularly in stocks and bonds. In furtherance of that purpose All Continent Corporation kept and maintained accounts with various brokerage firms in the City of New York and elsewhere. Said All Continent Corporation opened accounts with brokers where the said Fox previously had and maintained accounts of his own for his personal transactions. With some of said brokers said Fox maintained an account not only in his own individual name, but also in the name of third parties, and particularly in the name of one Ben Leo, who is the brother-in-law of said Fox. With the brokers with whom said Fox maintained accounts in his own name and the name of said third parties, particularly said Ben Leo, said All Continent Corporation also opened accounts in its name and in the name of said third parties, particularly in the name of said Ben Leo. The brokerage concerns with whom the above named bankrupt and All Continent Corporation maintained most active accounts were Loeb-Alsberg & Co., Hirsch-Lillienthall & Co., Fenner & Beane, and Block, Maloney & Co.

17. Shortly after the formation of All Continent Corporation it appears by its minutes that appropriate action was taken by which said Fox was designated attorney-in-fact for All Continent Corporation, to act for and in its behalf in the purchase and sale of stocks, bonds and securities from and through the four brokerage firms last hereinbefore mentioned. In addition to the specific resolution [fol. 100] above referred to, the testimony heretofore given during said 21-a examination discloses that William Fox in fact did act as general manager for All Continent Corporation in all of its business transactions.

18. The testimony of said Leitstein given under 21a examination further discloses that said All Continent Corporation had as its legal representatives in the City of New York the law firm of Hirsh, Newman, Reass and Becker. This same firm of attorneys was also the legal representative of said Fox and said firm appears in the aforesaid

bankruptcy proceedings as attorney for said Fox, the bankrupt. Also said firm of attorneys, Hirsh, Newman, Reass, & Becker are allegedly the attorneys for Eva Fox, Belle Fox, Mona Fox, all of whom are members of the family of said William Fox. Said Benjamin Reass, a member of said firm of Hirsh, Newman, Reass and Becker, was President of All Continent Corporation from the time of its organization until August 12, 1935. Various other members of said firm, and particularly Emanuel Newman, Murry C. Becker and Daniel G. Rosenblatt, acted as Secretary of said Corporation at different times throughout the period of its existence.

19. It further appears from the testimony of said Leitstein that Mr. Fox, the above named bankrupt, acting in his capacity as general manager of All Continent Corporation or otherwise, from time to time and frequently gave instructions to him, the said Leitstein, respecting the drawing of checks on the bank account of All Continent Corporation and the payment of bills, both for the benefit of said All Continent Corporation and said bankrupt. Fox at no time received from said All Continent Corporation any salary or other compensation for the services which he ren- [fol. 101] dered to it as general manager as aforesaid, or otherwise.

20. During the period from the time of the formation of All Continent Corporation until now, all of the securities allegedly belonging to All Continent Corporation and not on deposit with brokers or as collateral for loans, were deposited and kept in a vault registered and recorded in the name of said William Fox at the Chemical Safe Deposit Company in the City of New York. During the period from the time of formation of All Continent Corporation until sometime in the year 1933, said William Fox had access to and the right to admission to said vault. From sometime in the year 1933 and thereafter said Leitstein and said Benjamin Reass, Esq., were given authority and the right to access to said vault for the purpose of depositing therein or removing therefrom securities. During the years 1930 to 1934 inclusive and until April of 1935, the rental charges for said vault were paid by Fox, the bankrupt. In April of 1935 All Continent Corporation for the first time paid the rental for said vault for the period from then until April, 1936. Said vault, however, remained registered and

recorded in the name of said William Fox, and continues to be registered in his name so far as the records show.

21. In the books of account of All Continent Corporation and particularly in the ledger there is kept and maintained an account designated as "Stock Investment Vault Account" wherein numerous purchases and sales of stocks and securities are recorded as having been delivered to and withdrawn from the vault which was registered and maintained in the name of said William Fox, the bankrupt as aforesaid.

[fol. 102] 22. Furthermore, said Leitstein during the course of his examination as aforesaid, admitted that he did from time to time use the books of All Continent Corporation for the purpose of posting entries in the books of said bankrupt.

23. The testimony thus far given in the 21-a examination proceedings discloses that subsequent to the acquisition by All Continent Corporation of the securities hereinbefore referred to from the bankrupt, and subsequent to January 28, 1931, the date of the alleged conveyance by the bankrupt to his wife of the shares of All Continent Corporation pursuant to the aforesaid alleged trust indenture, that there were numerous transactions and agreements between All Continent Corporation and said bankrupt, numerous transactions by All Continent Corporation for the benefit of said bankrupt, and numerous transactions by the bankrupt for All Continent Corporation. Illustrations of the types of transactions heretofore testified to or disclosed in the records of All Continent Corporation marked in evidence in the 21-a proceedings follow:

a. The cash book of All Continent Corporation reveals that from the date of its organization until the present time it has disbursed through bank accounts maintained by it a total of about $13,100.00. of which about $12,115,000.00 has been disbursed in connection with transactions with said Fox, the aforesaid bankrupt, transactions between All Continent Corporation and said Fox, or by All Continent Corporation for the benefit of said Fox. Insofar as any conclusion can be gathered by the disbursements made by All Continent Corporation, the main purpose of its organization was as a vehicle for said Fox to carry on his own private business affairs.

[fol. 103] b. The records of All Continent Corporation reveal that securities belonging to the bankrupt were put up as collateral for loans allegedly made to All Continent Corporation and securities belonging to All Continent Corporation were put up as collateral for loans allegedly made to the bankrupt by third parties. One transaction already disclosed by the testimony reveals a close intermingling of the affairs of said bankrupt and said All Continent Corporation. In connection with a loan of the National Safety Bank and Trust Co. of New York made to one Rubinstein and taken over by said Fox, there was deposited as additional collateral some 500 shares of Loew stock which when the loan was paid off was delivered by National Safety Bank & Trust Co. to a firm of brokers by the name of Loeb-Alsberg & Co. with which brokers both William Fox and All Continent Corporation had accounts. Originally the 500 shares of Loew stock were placed in the account of William Fox. The shares of stock, however, were claimed by All Continent Corporation. There is no entry in the books of William Fox to show that he delivered to National Safety Bank & Trust Co. said shares of Loew stock. Likewise there is no entry in the books of All Continent Corporation to show that it delivered to the National Safety Bank and Trust Co. the said shares of Loew stock. A pencil notation in the books of All Continent Corporation entered in respect to a purchase of 500 shares of Loew stock on a particular day identifies the said shares of stock purchased on that day as the stock which was delivered to the National Safety Bank and Trust Co. as additional collateral for the loan for which William Fox was obligated.

[fol. 104] c. Another instance of the close relationship existing between All Continent Corporation and said Fox, the bankrupt, is evidenced by entries appearing in the books of William Fox and books of All Continent Corporation with respect to a corporation known as Aronberg-Fried Co., Inc. According to the books of All Continent Corporation it advanced to Aronberg-Fried Co. the sum of $450,000.00. In 1933 Aronberg-Fried Co. made an application to the Maryland Casualty Company for a bond in connection with a contract which Aronberg-Fried Co. was about to enter into with the United States Government for the construction of a building in Washington. In connection with the application for said bond, Aronberg-Fried Co.

wrote a letter signed by all of its officers, directors and stockholders and also signed by Emanuel Newman, a member of the firm of Hirsh, Newman, Reass & Becker, as attorney in fact for William Fox. Said letter contained a statement as to the financial condition of Aronberg-Fried Co. and contained representations to the effect that William Fox had purchased from Aronberg-Fried Co. debentures in the sum of $450,000. The books of William Fox contained no entries to show that he had made any advances to Aronberg-Fried Co. or had purchased from Aronberg-Fried Co. any debentures, although the books of All Continent Corporation do show that it had advanced to Aronberg-Fried Co. the sum of $450,000. The letter above referred to contains an agreement by William Fox that he will not accept repayment from Aronberg-Fried Co. of the said $450,000. while the bond of the Maryland Casualty Co. is outstanding.

d. Also prior to the formation of All Continent Corpora- [fol. 105] tion, Fox, the aforesaid bankrupt, caused to be organized a corporation known as Transient Garage Corporation, the stock of which was owned by a corporation designated and known as Consolidated Biological Products, Inc., also a New York corporation. Said bankrupt was the owner of all of the stock of the latter corporation up until about December, 1935. The record of said 21-a examination disclosed that during recent years the bankrupt used the bank account of Transient Garage Corp. for his personal use and benefit and while so doing maintained no bank account in his personal name. The books of All Continent Corporation disclose that it frequently advanced moneys to said Transient Garage Corp. which were deposited in its account and from which said moneys were withdrawn for the purpose of paying obligations of said Fox, the bankrupt. The checks which were issued against the said account of Transient Garage Corporation by which moneys were withdrawn therefrom for the benefit of said Fox, were signed by him, the said Fox.

e. The records of All Continent Corporation further disclose that the firm of Hirsh, Newman, Reass and Becker acted as the clearing house for funds received by said firm from All Continent Corporation, from William Fox and from other sources. Entries in some of the books of All Continent Corporation indicated that the account was known as the Hirsh, Newman, Reass & Becker Trustee Ac-

count. Hirsh, Newman, Reass & Becker out of this one account made disbursements allegedly for the benefit of All Continent Corporation and allegedly for the benefit of said William Fox.

[fol. 106] f. Another illustration of the close relationship between said All Continent Corporation and said Fox appears from certain transactions which took place between said All Continent Corporation and a corporation by the name of Parkwood Corporation, which in turn had transactions with the bankrupt, All Continent Corporation, Transient Garage Corporation, Eva Fox the wife of the bankrupt, and others. Parkwood Corporation, according to the testimony adduced at said 21-a examination, was organized at or about the same time that All Continent Corporation was organized. It at no time owned any property or engaged in any business for which it needed money or from which it earned money. Until 1934 Parkwood Corporation engaged in no transactions of any kind. In 1934 Parkwood Corporation received various sums of money which according to its books were received by it by way of loan from All Continent Corporation, Belle Fox the daughter of the bankrupt, Mona Fox the daughter of the bankrupt, the bankrupt himself and others. During the years 1934 and 1935 all of the disbursements by Parkwood Corporation were in payment of obligations of the bankrupt for which he in turn was charged on the books of All Continent Corporation. During the year 1936 disbursements made by Parkwood Corporation were either for the bankrupt, or according to the books and records of the Parkwood Corporation, were for Eva Fox, the wife of the bankrupt. Identical disbursements listed in the records of Parkwood Corporation for the wife of the bankrupt and charged on the books of All Continent Corporation to the wife of the bankrupt, are charged on the books and records of the bankrupt to the bankrupt.

[fol. 107] g. Further illustration of the inter-wined relationship of the bankrupt and All Continent Corporation is evidenced by certain entries in the books of All Continent Corporation with respect to an account known as the Belle Fox account. Belle Fox is a daughter of William Fox, the bankrupt. According to the testimony adduced at said 21-a examination, said Fox had in his safe deposit box at the Chemical Safe Deposit Company in 1933 at least $200,000.

in cash. Said testimony further discloses that in 1933 Leitstein and Reass took out of the bankrupt's safe deposit box this sum of cash, part of which found its way in the bank account of All Continent Corporation. On the books and records of All Continent Corporation credit for the deposit of part of this cash is given to Belle Fox. Out of this cash All Continent Corporation paid obligations for said bankrupt for which on the books of All Continent Corporation he was charged. Claim has been made by the attorneys for said bankrupt and also by the witness Leitstein that the bankrupt made a gift of the $200,000 in cash to his daughter Belle Fox, who refused to loan any part of it except to All Continent Corporation, and that the transaction according to the entries on the books of All Continent Corporation was that Bell Fox loaned the money to All Continent Corporation which in turn loaned it to said Fox. There is no entry in any of the bankrupt's books to show any gift of $200,000 by the bankrupt to his daughter Belle Fox.

h. It has also been disclosed and appears as a fact that the bankrupt was the owner and possessor of all the stock of a corporation known as Namtaw Realty Co. Namtaw Realty Co. was the owner of real property. It had no [fol. 108] bank account. The books of All Continent Corporation disclosed that rents collected from tenants in possession of the real property owned by Namtaw Realty Co. were deposited in the bank account of All Continent Corporation and credited to William Fox. So far as has been disclosed and to the knowledge of this deponent Namtaw Realty Co. did not keep or maintain any books of account.

i. In addition to the above transactions said Fox, the bankrupt, acting on his own behalf entered into contracts with All Continent Corporation represented by him as aforesaid, and gave to All Continent Corporation as collateral security for obligations allegedly owing from the bankrupt to All Continent Corporation certain collateral. As a result of these agreements and the deposit of the aforesaid collateral, All Continent Corporation is alleged to have thereafter acquired said property on or about December 1935, by foreclosing the notes or other obligations allegedly given by said Fox, the bankrupt, to said All Continent Corporation.

24. During all the time after the formation of All Continent Corporation until about February, 1936, numerous advances of money were made by said All Continent Corporation to Eva Fox, the wife of the bankrupt, either directly or for her benefit, and said advances were charged to William Fox, the bankrupt, on the books of All Continent Corporation. This occurred at a time when said Eva Fox is alleged to have been the owner of all the stock of All Continent Corporation.

25. Also from said 21-a examination it appears at the [fol. 109] end of each month the bankrupt and said All Continent Corporation received statements of their accounts with the several brokers with whom they dealt as hereinbefore stated. It has been disclosed that items appearing on said brokerage statements of All Continent Corporation have been charged against the bankrupt on his books of account and vice versa. In fact, said Leitstein has testified during his examination as aforesaid that he could not complete entries in the books of said Fox the bankrupt until after he had gotten the brokerage statements respecting the accounts of All Continent Corporation with said brokers.

26. From the time of the formation and organization of All Continent Corporation down until the present time, its business has been confined to holding securities and assets originally transferred to it by said Fox, to transactions dealing in these securities and others purchased from time to time out of the funds realized from the sale of the original securities and from moneys borrowed thereon. In addition thereto said Corporation has been used as a conduit or medium for the business transactions of said Fox himself as well as other corporations which he owned and controlled.

27. From information which has so far been adduced at said 21-a examination, it does not appear that any payments of money were made to said Eva Fox, the wife of said William Fox, from the income received from said alleged trust created by him from the time of the creation thereof until December 30, 1935, at which latter time she, the said Eva Fox, is alleged to have received the sum of $25,000 salary for services rendered by her during the year 1935. No provision for the payment of said sum was made by said All Continent Corporation prior to December, 1935.

[fol. 110] 28. At or about August, 1935, Eva Fox, the wife of said William Fox, Belle Fox and Mona Fox, daughters of said William Fox, are alleged to have become the directors of said All Continent Corporation. Also at or about said time said Eva Fox is alleged to have become President and Treasurer of said Corporation, and Mona Fox the Secretary and Belle Fox the Vice-President respectively thereof. There were no formal meetings of the directors of said All Continent Corporation. It has been disclosed in said 21-a examination that the minutes of said corporation were drawn and prepared in the office of said attorneys Hirsh, Newman, Reass & Becker, and presented to the respective directors for signature. Such meetings did not occur at regular intervals. Mona Fox and Belle Fox both testified during said 21-a examination that neither of them had at any time taken any active part in the affairs of said corporation. They the said Mona Fox and Belle Fox did sign minutes of said corporation from time to time as well as other documents, but during their said examination they admitted that they were not conversant with the matters recorded in any of the documents which they signed and that they signed the same merely because they were asked to do so by their parent.

29. It has also been disclosed during said 21-a examination that those persons who acted as directors and officers of said All Continent Corporation prior to August, 1935, signed and delivered to said All Continent Corporation or its representative undated resignations from the offices to which they had been elected.

30. On February 3, 1936, said William Fox is alleged to have entered into agreement with said All Continent Cor-[fol. 111] poration whereby it is claimed that he sold and conveyed certain property and assets enumerated therein to said All Continent Corporation and a true copy of said agreement is attached to the foregoing bill of complaint and marked Exhibit "B".

31. Also on May 23, 1936, said William Fox is alleged to have entered into agreement with said All Continent Corporation whereby it is claimed that he the said Fox conveyed and transferred to said All Continent Corporation certain shares of Building and Loan stock enumerated therein which were theretofore the property of said William Fox, but that thereby said All Continent Corporation be-

came the owner and possessor thereof. A true copy of said agreement is attached to the foregoing bill of complaint and marked Exhibit "C". By virtue of the sale of said collateral security and the transfer of property enumerated in said agreements, Exhibits "B" and "C", said William Fox was divested of all property of every kind and description which was of any importance or value and he was thereby denuded of all the vast wealth of which he had theretofore been possessed and which he had theretofore enjoyed.

32. In and by the voluntary petition in bankruptcy which was filed by said William Fox resulting in his adjudication as a bankrupt, said Fox listed liabilities in the aggregate amount of $9,535,261.91 and assets of a total or aggregate value of $1,590,000.00. Of said liabilities it is averred in said schedules that said Fox is indebted to said All Continent Corporation in the total sum of $417,258.19. From information which has come to this deponent from a source such that he believes it to be true, it would appear that said averment in said schedules is incorrect and in error and that said William Fox is not indebted to said All Continent [fol. 112] Corporation in any amount. Of said total assets shown in said schedules, said William Fox represents that he is possessed of real estate of the total aggregate value of $1,400,000.00, of bills, promissory notes and securities of the total value of $190,000.00 and of cash on hand in the total sum of $100.00. The real estate which said Fox avers to be the value of $1,400,000 is referred to in his said schedules in the following manner: "Undivided one-half interest in property located on Market Street, in the City of San Francisco, State of California, owned by the petitioner, together with Capital Company, a California corporation, the other one-half undivided interest being owned by the Capital Company, a California corporation. The said undivided one-half interest of petitioner being subject to a deed of trust given to secure the payment of moneys loaned to the petitioner in connection with the acquisition of this property. The said deed of trust is a lien on the undivided one-half interest of your petitioner in the sum of $470,000. with interest. Estimated value of undivided one-half interest of petitioner which was acquired at an original cost of approximately $1,400,000. over and above the liens, mortgages and encumbrances thereon, and subject to the community

interest of Eva Fox, as wife, is subject to possible defeasance of petitioner's title to foregoing real estate by reason of a purported sale thereof, under a deed of trust thereon, held on May 11, 1936, which sale petitioner claims was illegal and in violation of his rights." It is doubtful whether or not said William Fox is the owner of said interest in said real estate as alleged by him, and it is also doubtful whether or not said real estate is of the value alleged, and in order to determine the interest of said Fox in said real estate it is necessary that litigation be instituted in the State of California for the purpose of determining said ownership and the value thereof. The bills, promissory [fol. 113] notes and securities which are listed in the said bankruptcy schedules total $190,000. consisting of four notes of C. H. Huston, all of which are long over due and the value of said notes is very doubtful. In fact I am informed that said Huston is at the present time without property or means from which said indebtednesses might be recovered, and also I have been unable thus far to obtain the whereabouts of said Huston. A careful analysis of the schedules of said bankrupt, William Fox, discloses that at the time of the filing thereof and his adjudication in bankruptcy, he, the said Fox, was to all intents and purposes without property of any value from which his various debts and liabilities might be paid and satisfied.

33. Said schedules in bankruptcy filed by said Fox also disclose that he paid a total sum of $7500.00 cash to counsel for services rendered or to be rendered in connection with said bankruptcy proceedings, and that sum was so paid to the following: Messrs. Bourgeois & Coulomb $3,000.00, Robert P. Levis, Esq., of New York City, $2500., and Messrs. Hirsh, Newman, Reass & Becker of New York City $2,000.00. Certain members of the law firm of Hirsh, Newman, Reass & Becker, and particularly Murry C. Becker, Esq., and Daniel G. Rosenblatt, Esq., either or both of them, have continuously been in attendance upon the hearings had under said 21-a examination and have actively participated therein as the representative of the bankrupt regardless of who was being examined. They have throughout said examination frequently and repeatedly interposed objection to questions which have been asked of witnesses as well as objections to various other things that have been urged to be done throughout said

examination. The persons thus far examined under said [fol. 114] 21-a examination are Herbert Leitstein, Joseph Hart, who acted as Leitstein's Assistant bookkeeper, Mona Fox and Belle Fox, both daughters of the bankrupt, Murry C. Becker, Esq., and Daniel G. Rosenblatt, Esq., both members of the firm of Hirsh, Newman, Reass & Becker, attorneys for bankrupt, Albert M. Greenfield and one Blasband who appeared to testify from the records of Bankers Security Corporation and Bansecor Corporation, both of the State of Pennsylvania.

34. I am informed from such source that I believe it to be true and therefore aver that said All Continent Corporation was formed and organized by said William Fox for the express purpose of defrauding his creditors then existing as well as those to whom said Fox thereafter became indebted; that said William Fox and said All Continent Corporation are one and the same; that the real object sought to be attained by said William Fox in the formation and organization of said All Continent Corporation was to thwart his, Fox's, creditors, and to retain for himself and his family the full and unmolested enjoyment of all his assets in fraud of his creditors; and that said William Fox formed and organized All Continent Corporation and used its corporate form for the purpose of evading the law and perpetrating a fraud upon his creditors existing at the time of the formation thereof as well as those to whom he thereafter became indebted, and that the legal entity of said corporation was interposed by him so as to defeat justice.

35. I am further informed from such source that I believe to be true and therefore aver that the formation and organization of All Continent Corporation, the transfer and assignment of assets by said Fox to said corporation [fol. 115] in return for the issuance and delivery of the capital stock of said corporation to said Fox, the making of said trust indenture by said Fox to said Eva Fox, Trustee, the foreclosure sale of the collateral of said William Fox deposited in connection with the note which said Fox delivered to said All Continent Corporation, the assignment and transfer by said Fox of the securities named in said agreement of February 3, 1936, the transfer and as-

signment by said Fox to said corporation of the assets named in said agreement of May 23, 1936, as well as all of the other things done by and between said Fox and said All Continent Corporation as enumerated and set out in the foregoing bill of complaint, were each and every one of them a part of a general scheme or plan devised and put into effect by said William Fox in order to hinder, delay and defraud his creditors and to retain for himself and his family in fraud of his creditors the full and unmolested enjoyment of all his assets.

36. I am further informed from such source that I believe it to be true and therefore aver that Eva Fox, the wife of the bankrupt, and Belle Fox and Mona Fox, daughters of said bankrupt, were in full and complete knowledge at all times of the things done as complained about in the foregoing bill of complaint and that they, the said Eva Fox, Belle Fox and Mona Fox, either sat by and permitted said things to be done by said William Fox, or assisted in the doing thereof, all in fraud and to the damage of the creditors of said William Fox, and particularly is this so in connection with the organization of said All Continent Corporation, the creation of the alleged trust of the capital stock of All Continent Corporation, the use of said All Continent Corporation for the personal benefit and gain of the said William Fox, the foreclosure sale of the collateral of said Fox deposited with the note which said Fox had [fol. 116] delivered to said All Continent Corporation, and the transfer of the assets of said Fox by means of said agreements of February 3rd and May 23, 1936.

37. I am also informed from such source that I believe it to be true and therefore aver that as a result of the transfer by said Fox to said All Continent Corporation of assets which were theretofore owned by him and which transfer was made between the dates of December 23rd and December 29th, 1930, and the assignment to said All Continent Corporation of said brokerage credits at or about the same time, and also as a result of said trust indenture dated January 28, 1931, said William Fox became insolvent and thereafter continued to be insolvent.

38. Also I am informed from such source that I believe it to be true and therefore aver that none of the attempted transfers and assignments of assets by said William Fox

to said All Continent Corporation were ever completely and legally consummated and that this is particularly so insofar as the attempted assignment and transfer of December, 1930, the assignment to Eva Fox, Trustee, in January, 1931, the sale of the collateral of said William Fox in December 1935, and the assignment by virtue of the agreements dated February 3rd and May 23rd, 1936, are concerned.

39. Said All Continent Corporation maintains its business office in the City of Atlantic City, Atlantic County, New Jersey, and all of its books of account, records and property of every kind and description are maintained there.

40. Said William Fox, Eva Fox, Belle Fox and Mona Fox are all residents of said Atlantic City.

[fol. 117] 41. Some time prior to the adjudication of said Fox as a bankrupt as aforesaid, he assigned, transferred and conveyed certain real estate belonging to him and situate at Woodmere, Long Island, in the State of New York, to said Eva Fox, his wife. Said real estate was of considerable extent and of great value.

42. Both said Fox and Eva Fox, his wife, claim and allege the transfer of said Woodmere properties took place on or about April 14, 1930. However, I am informed from such source that I believe it to be true and therefore aver that the said transfer was not had and consummated at or about said time, but in fact was consummated at a much later date, if at all.

43. Also it is claimed and alleged by said Fox that on or about August 20, 1931, he paid and satisfied a certain mortgage debt or obligation amounting to the sum of $20,000 which was a lien upon the aforesaid Woodmere property and that the payment thereof occurred after the transfer of said property to said Eva Fox. The sum so required to pay off and satisfy said mortgage was paid by said Fox from his personal funds.

44. Said Fox also claims and alleges that on or about January 8, 1931, he assigned and transferred to said Eva Fox, his wife, 500 shares of the preferred stock of Aronberg Fried Company and 200 shares of the stock of Whip-Poor-Will Corporation which theretofore belonged to and was owned by him and which said stocks then and there were of great value.

45. Also it is claimed and alleged by said Fox that on or about August 5, 1931, he assigned and transferred to said [fol. 118] Eva Fox, his wife, 857 shares of the stock of Fox Westwood Corporation and 750 shares of Fox Hills Corporation which theretofore belonged to and was owned by him and which said stocks then and there were of great value.

46. Said Fox also alleges and claims that on or about January 4, 1933, he withdrew from his personal funds the sum of $32,684.00 with which he paid for and purchased 327 shares of the stock of Fox Westwood Corporation which were allegedly issued and delivered to said Eva Fox the wife of said William Fox, at some time during the year 1932.

47. Said Fox alleges and claims that said assignments and transfers and all of the things set out in the foregoing paragraphs hereof numbered 41 to 46, both inclusive, were intended to be and were in fact gifts from him to his said wife.

48. Said assignments and transfers of said property, money and stocks made by said Fox to Eva Fox, his wife, were made without any real, valuable or adequate consideration passing from her to him.

49. I am informed from such source that I believe it to be true and therefore aver that said assignments and transfers made by said Fox to his said wife were not in fact made at the times alleged and claimed by him, but were in fact made at much later times; that said assignments and transfers were not in fact completely made and fully consummated; that said assignments and transfers were made by said Fox to his said wife for the express purpose of defrauding his creditors then existing as well as those to whom he thereafter became indebted; that the real object sought to be attained by said Fox in making said as- [fol. 119] signments and transfers to his said wife was to thwart his creditors and to retain to himself and to his said wife the full and unmolested enjoyment of said assets and property in fraud of his creditors existing at the time and those to whom he thereafter became indebted; that said assignments and transfers so made as aforesaid by said Fox to his said wife were made in covinous agree-

ment between him and her to hinder, delay and defraud the creditors of said William Fox and to retain for himself and his said wife the full and unmolested enjoyment of all his assets in fraud of his creditors then existing and those to whom he thereafter became indebted; that said Fox made said assignments and transfers at a time when he was insolvent and unable to pay and satisfy his just debts and obligations; that as a result of said assignments and transfers, he, the said William Fox, became insolvent and particularly is this true by reason of the transfer of the assets of said Fox to said All Continent Corporation at or about the same time as said assignments and transfers were made to said Eva Fox as set out in the first part of the foregoing bill of complaint; and that said assignments and transfers were each and every one of them, a part of a general scheme or plan devised and put into effect by said William Fox in order to hinder, delay and defraud his creditors and to retain to himself and his said wife and other members of his said family the full and unmolested enjoyment of all his assets in fraud of his creditors then existing as well as those to whom he thereafter became indebted.

50. Also some time prior to the adjudication of said Fox as a bankrupt as aforesaid he claims to have assigned and transferred to Belle Fox, his daughter, 905 of the voting trust certificates of Bankers Security Corporation and 70 shares of the common stock of said Bankers Security Cor-
[fol. 120] poration which said assignment or assignments, transfer or transfers, are alleged to have taken place at or about January, 1931.

51. Also said Fox claims to have paid and turned over to said Belle Fox the sum of $200,000.00 in cash withdrawn from his personal funds and that said payment was made at or about January, 1932.

52. Sometime during the years 1928 and 1929 said Fox alleges and claims that he assigned and transferred to said Belle Fox, his daughter, 160 shares of the preferred stock of said Bankers Security Corporation which theretofore belonged to and was owned by him.

53. Said Fox alleges and claims that said assignments and transfers and all of the things set out in the foregoing

paragraphs hereof numbered 50 to 52, both inclusive, were intended to be and were in fact gifts from him to his said daughter, Belle Fox.

54. I am informed from such source that I believe it to be true and therefore aver that said assignments and transfers of said property and money by said Fox to Belle Fox, his daughter, were made without any real, valuable or adequate consideration passing from her to him; that said assignments and transfers were not in fact made at the times alleged and claimed by said Fox, but were in fact made at much later times; that said assignments and transfers were not in fact completely made and fully consummated; that said alleged assignments and transfers of property and money were made by said Fox to his said daughter, Belle Fox, for the express purpose of defrauding his creditors then existing as well as those to whom he thereafter became indebted; that the real object sought to be attained by said [fol. 121] Fox in making said assignments and transfers to his said daughter was to thwart his creditors and to retain to himself and to his said daughter the full and unmolested enjoyment of said assets and property in fraud of his creditors existing at the time and those to whom he thereafter became indebted; that said assignments and transfers so made as aforesaid by said Fox to his said daughter were made in covinous agreement between him and her to hinder, delay and defraud the creditors of said William Fox and to retain for himself and his said daughter the full and unmolested enjoyment of all his assets in fraud of his creditors then existing and those to whom he thereafter became indebted; that said Fox made said assignments and transfers at a time when he was insolvent and unable to pay and satisfy his just debts and obligations; that as a result of said assignments and transfers he, the said William Fox, became insolvent and particularly is this true by reason of the transfer of the assets of said Fox to said All Continent Corporation at or about the same time as said assignments and transfers were made to said Belle Fox as set out in the first part of the foregoing bill of complaint; and that said assignments and transfers were, each and every one of them, a part of a general scheme or plan devised and put into effect by said William Fox in order to hinder, delay and defraud his creditors and to retain to himself and his said daughter and other members of his said family the full and unmolested enjoyment of all his assets in fraud of his credi-

tors then existing and those to whom he thereafter became indebted.

55. Also some time prior to the adjudication of said Fox as a bankrupt as aforesaid he claims to have assigned and transferred to Mona Fox, his daughter, 160 shares of the preferred stock of Bankers Security Corporation which [fol. 122] said assignment and transfer is alleged to have taken place during the years 1928 and 1929.

56. Also said Fox claims to have paid and turned over to said Mona Fox the sum of $139,500.00 in cash withdrawn from his personal funds and that said payment was made at or about March 2, 1932.

57. Said Fox alleges and claims that said assignments and payment of money set out in the foregoing paragraphs hereof numbered 55 and 56, both inclusive, were intended to and were in fact gifts from him to his said daughter, Mona Fox.

58. I am informed from such source that I believe it to be true and therefore aver that said assignments and transfers of said property and money by said Fox to Mona Fox, his daughter, were made without any real, valuable or adequate consideration passing from her to him; that said assignments and transfers were not in fact made at the times alleged and claimed by said Fox, but were in fact made at much later times; that said assignments and transfers were not in fact completely made and fully consummated; that said alleged assignments and transfers of property and money were made by said Fox to his said daughter, Mona Fox, for the express purpose of defrauding his creditors then existing as well as those to whom he thereafter became indebted; that the real object sought to be attained by said Fox in making said assignments and transfers to his said daughter was to thwart his creditors and to retain to himself and to his said daughter the full and unmolested enjoyment of said assets and property in fraud of his creditors at the time and those to whom he thereafter became indebted; that said assignments and transfers so made as [fol. 123] aforesaid by said Fox to his said daughter were made in covinous agreement between him and her to hinder, delay and defraud the creditors of said William Fox and to retain for himself and his said daughter the full and unmolested enjoyment of all his assets in fraud of his creditors then existing and those to whom he thereafter became

indebted; that said Fox made said assignments and transfers at a time when he was insolvent and unable to pay and satisfy his just debts and obligations; that as a result of said assignments and transfers he, the said William Fox, became insolvent and particularly is this true by reason of the transfer of the assets of said Fox to said All Continent Corporation at or about the same time as said assignments and transfers were made to said Mona Fox as set out in the first part of the foregoing bill of complaint; and that said assignments and transfers were, each and every one of them, a part of a general scheme or plan devised and put into effect by said William Fox in order to hinder, delay and defraud his creditors and to retain to himself and his said daughter and other members of his said family the full and unmolested enjoyment of all his assets in fraud of his creditors then existing and those to whom he thereafter became indebted.

59. This action is instituted herein by and with the approval of the U. S. District Court for the District of New Jersey by order entered in said bankruptcy proceedings on Oct. 13, 1936.

Hiram Steelman.

Sworn and subscribed to before me this 13th day of October, 1936. James N. Butler, M. C. C. of N. J.

[fol. 124] A true copy. Wm. Elmer Brown, Jr., Solicitor for Complainant.

In Chancery Court of New Jersey

Between

Hiram Steelman, Trustee for William Fox, a Bankrupt, Complainant,

and

All Continent Corporation, William Fox, Eva Fox, Belle Fox, Mona Fox, William Fox Tauszig and William Fox Schwartz, Defendants

On Bill, etc.

Order to Show Cause

Hiram Steelman, Trustee for William Fox, a bankrupt, having filed his bill of complaint herein, duly verified,

wherein it appears among other things that All Continent Corporation, one of the above named defendants, is in possession of certain property and assets which it claims to own but which in fact it is alleged are the property and assets of said William Fox, the aforesaid bankrupt, that said assets and property were transferred by said Fox to said All Continent Corporation in fraud of his creditors then existing and those to whom he thereafter became indebted; that the transfer of said property and assets to said All [fol. 125] Continent Corporation was in furtherance of a general scheme of said William Fox, the bankrupt, to hinder, delay and defraud his said creditors, and to assure to him and to his family the unmolested benefit and possession thereof; and that said transfer of said property and assets to said All Continent Corporation was made at a time when said William Fox, the bankrupt, was insolvent and also that as a result of said transfer said Fox became insolvent, all in fraud of his said creditors.

And it further appearing from said duly verified bill of complaint that said William Fox prior to his adjudication in bankruptcy, transferred certain of his property and assets to each of the defendants, Eva Fox, Belle Fox and Mona Fox, all of which was allegedly done in fraud of the creditors of him, the said William Fox; that said transfers to said Eva Fox, Belle Fox and Mona Fox were made without any real, valuable or adequate consideration; that said transfers so made by said William Fox to said Eva Fox, Belle Fox and Mona Fox, were made at a time when said Fox was in fact insolvent and that he became insolvent as a result thereof; that said transfers of property and assets by said Fox to said Eva Fox, Belle Fox and Mona Fox were all in furtherance of a general scheme of the said Fox in which they, the said Eva Fox, Belle Fox and Mona Fox joined, to hinder, delay and defraud the creditors of him, the said William Fox, and to assure to him, the said Fox, and said Eva Fox, Belle Fox and Mona Fox and other members of his family the unmolested use and benefit of said property and assets.

And said Complainant herein among other things having prayed for relief that will assure the preservation of said property and assets in the form in which they now are until such time as the matters in issue in this suit can be finally determined;

[fol. 126] It is, on this 13th day of October, A. D., 1936, Ordered that All Continent Corporation, William Fox, Eva Fox, Belle Fox and Mona Fox, they and each of them, show cause before this Court on Tuesday, the 10th day of November, 1936, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the Chancery Chambers, Atlantic City, why they should not be enjoined and restrained from selling, assigning, transferring, mortgaging or otherwise disposing of or encumbering said assets and property so acquired by them from said William Fox in the manner set forth in the bill of complaint filed in this cause until the further order of this Court, or until the matters and thinks in issue herein shall be finally determined.

And it is further Ordered that said defendants show cause at the time and place aforesaid why this Court should not appoint a receiver to take and hold in his possession all of the assets acquired by them from said William Fox in the manner set forth in the bill of complaint filed in this cause, wherever the same may be found and whatever the same may be, to manage, control and preserve the same under the supervision of this Court until the matters and things herein in issue can be finally determined.

And it is further Ordered that in the meantime said All Continent Corporation, William Fox, Eva Fox, Belle Fox and Mona Fox be and they hereby are enjoined and restrained from selling, assigning, transferring, mortgaging or otherwise disposing of or encumbering any of said assets until the further order of this Court.

And it is further Ordered that a copy of this Order to Show Cause, together with a copy of the bill of complaint and affidavit attached thereto, all of which may be uncertified but marked "A true copy" by the solicitor of the [fol. 127] complainant, be served upon said All Continent Corporation by serving the same upon an officer or director thereof, and upon the defendants William Fox, Eva Fox, Belle Fox and Mona Fox by serving the same upon each of them personally or by handing a copy thereof to some member of their family above the age of fourteen years, at their usual place of residence within 5 days from the date hereof.

Luther A. Campbell, C.

Respectfully advised: W. F. Sooy, Vice Chancellor.

IN DISTRICT COURT OF THE UNITED STATES IN AND FOR THE EASTERN DISTRICT OF PENNSYLVANIA, JUNE TERM, 1936

In Equity. No. 9533

ALL CONTINENT CORPORATION, Plaintiff,

vs.

JOHN S. WYNN, JAMES H. WYNN, HAROLD A. LONGWELL, E. Schuyler Jackson, Jr., Russell R. Hires, Archibald W. Austin, James B. Borden, Frederick W. Winterberg, [fol. 128] J. Maurice Wynn and James A. Longwell, Co-partners Trading under the Firm Name of J. W. Sparks & Company, Capital Company and Hiram Steelman, Trustee of the Estate of William Fox, a Bankrupt, Defendants

ANSWER OF JOHN S. WYNN, JAMES H. WYNN, HAROLD A. LONGWELL, E. SCHUYLER JACKSON, JR., RUSSELL R. HIRES, ARCHIBALD W. AUSTIN, JAMES B. BORDEN, FREDERICK W. WINTERBERG, J. MAURICE WYNN AND JAMES A. LONGWELL, CO-PARTNERS, TRADING UNDER THE FIRM NAME OF J. W. SPARKS & CO., TO THE BILL OF COMPLAINT

To the Honorable, the Judges of the United States District Court for the Eastern District of Pennsylvania:

John S. Wynn, one of the defendants in the above-entitled matter and a co-partner in the firm of J. W. Sparks & Co., files this Answer on behalf of himself and the other defendants herein named, and says: That the other defendants, viz: James H. Wynn, Harold A. Longwell, E. Schuyler Jackson, Jr., Russell R. Hires, Archibald W. Austin, James B. Borden, Frederick W. Winterberg, J. Maurice Wynn and James A. Longwell, deponent's co-partners, trading under the name of J. W. Sparks & Co., have authorized your deponent to come and file this, their Answer to the Bill of Complaint filed by the plaintiff in this proceeding, and the [fol. 129] deponent and said other defendants, saving and reserving unto themselves, and each of them, all benefit and advantage of exceptions to the manifold errors, uncertainties and other imperfections in the plaintiff's Bill of Complaint contained, for answer thereto, or to so much and such parts thereof as the defendants are advised it is material or necessary for them to answer.

Respectfully Showeth:

1. The defendants admit the allegations of Paragraph (1) of the Bill of Complaint and aver that they have no knowledge of any office or place of business which may be maintained by the plaintiff in any jurisdiction other than in the State of Delaware.

2. The defendants admit the allegations of Paragraph (2) of the Bill of Complaint and aver that the firm of J. W. Sparks & Co. is a limited partnership association, formed in accordance with the provisions of an Act adopted by the Legislature of the State of Pennsylvania, and approved April 12th, 1917, P. L. 55, and that J. Maurice Wynn and James A. Longwell are limited partners of said co-partnership, as will more fully appear by the Certificate of Formation of Limited Partnership filed by said defendants in accordance with the provisions of the aforesaid Act and recorded in the Office for the Recording of Deeds in and for the City and County of Philadelphia, in Partnership Book No. 15, Page 388, &c.

3. The defendants have no knowledge of the allegations of Paragraph (3) of the Bill of Complaint and therefore demand proof thereof upon the trial of this case.

4. The defendants have no knowledge of the allegations of [fol. 130] Paragraph (4) of the Bill of Complaint and therefore demand proof thereof upon the trial of this case.

5. The defendants admit the allegations of Paragraph (5) of the Bill of Complaint, and aver that the property or securities mentioned in Plaintiff's Bill of Complaint are located in the City and County of Philadelphia in the possession of the defendants, as hereinafter more fully set forth.

6. The defendants admit the allegations of Paragraph (6) of the Bill of Complaint.

7. The defendants admit the allegations of Paragraph (7) of the Bill of Complaint, but aver that the oral agreement set forth in said Paragraph is subject to the terms and provisions of two certain written agreements commonly known as "margin" and "customers'" agreements, each dated January 7th, 1936 and executed by the plaintiff. The defendants have attached hereto a copy of said "margin" agreement which is marked "Exhibit A", and a copy of said "customers'" agreement which is marked "Exhibit

B", and the defendants aver that the said agreements were delivered to the defendants when the plaintiff opened its account with the defendants on or about January 30th, 1936.

8. The defendants admit the allegations of Paragraph (8) of the Bill of Complaint.

9. The defendants admit the allegations of Paragraph (9) of the Bill of Complaint and the defendants aver that the securities delivered to and accepted by them for the [fol. 131] account of the plaintiff from time to time were accepted for and on behalf of, and as the property of the plaintiff herein.

10. The defendants admit the allegations in Paragraph (10) of the Bill of Complaint.

11. The defendants admit the allegations in Paragraph (11) of the Bill of Complaint.

12. The defendants admit the allegations in Paragraph (12) of the Bill of Complaint.

13. The defendants admit the allegations of Paragraph (13) of the Bill of Complaint and allege that the Motion which they filed to Vacate said Third Party Subpœna also presented certain legal questions therein mentioned; that said Motion to Vacate was decided adversely to the defendants, as will appear by an Opinion filed by the United States Circuit Court of Appeals for the Second Circuit, an extract from which Opinion appears in Paragraph (13) of the Bill of Complaint. That Harold A. Longwell, a member of the firm of J. W. Sparks & Co. and one of the defendants, was examined on September 22nd, 1936, pursuant to the Third Party Subpœna issued to the defendants and as required by said Opinion; that in said examination counsel for Capital Company inquired thoroughly into the business dealings between the defendants and All Continent Corporation, and the said Harold A. Longwell was also examined concerning any business dealings between the defendants and some sixty-four (64) individuals or corporations.

14. The defendants admit the allegations of Paragraph (14) of the Bill of Complaint, and aver that they have not been discharged in the proceedings of Capital Company vs. [fol. 132] William Fox, wherein said Third Party Subpœna was issued and served upon them. Defendants fur-

ther aver that said subpœna has prevented them from transferring or disposing of the account of All Continent Corporation and the securities therein contained which are held subject to a debit balance payable to the defendants and which debit balance as of October 14th, 1936, amounted to $308,764.97. The defendants further aver that there is a likelihood that the defendants may sustain a substantial loss in the event the issues raised by this proceeding are not expeditiously determined, or in the event the various securities now held for the account of All Continent Corporation are subsequently adjudged to be the property of the said William Fox.

15. The defendants admit the allegations of Paragraph (15) of the Bill of Complaint and aver that strenuous efforts are being made by the Capital Company and Hiram Steelman, Trustee of the Estate of William Fox, Bankrupt, in various proceedings, to prove that the securities held by the defendants for the account of All Continent Corporation are really the property of the said William Fox.

16. The defendants admit the allegations of Paragraph (16) of the Bill of Complaint, and the defendants aver that the plaintiff in this proceeding has been restrained from proceeding herein against Hiram Steelman, Trustee as aforesaid, by reason of a restraining order entered on October 7th, 1936, by the Honorable John Boyd Avis, Judge of the United States District Court for the District of New Jersey. The defendants therefore pray that Your Honorable Court should take jurisdiction of this matter and decide the issues raised by this proceeding because the securi- [fol. 133] ties are within the jurisdiction of this Court; the defendants will in all likelihood be required to appear in a number of jurisdictions and be subject to various orders and decrees which may be inconsistent one with the other and because it is necessary that the rights of all parties be promptly adjudicated so as to prevent the possibility of a loss falling upon the defendants who have no interest in said account excepting in accordance with the terms and provisions of said agreements (see Exhibits "A" and "B" hereof) and in the debit balance of said account which is payable to the defendants.

17. The defendants aver that all securities received by them for the account of All Continent Corporation were

received and accepted pursuant to resolutions adopted by the Board of Directors of All Continent Corporation and instructions received from the duly authorized officers thereof. The defendants have no knowledge that any securities in said account are the property of the said William Fox, and the defendants believe, and therefore, aver, that said securities, and all equity in said account, are the property of All Continent Corporation. The defendants request Your Honorable Court to take the testimony of the various claimants and, after hearing, enter such a decree as will properly protect the defendants herein.

18. The defendants admit the allegations of Paragraph (18) of the Bill of Complaint and aver that they have refused to transfer said account or to permit the All Continent Corporation to have any dealings in connection therewith because said Third Party Subpœna operates as a restraining order, which may place a liability upon the defendants for any loss and/or fine and imprisonment, or [fol. 134] either, as and for contempt, in the event any securities in said account are transferred and subsequently adjudged to be the property of the said William Fox.

19. The defendants admit the allegations of Paragraph (19) of the Bill of Complaint.

20. The defendants admit the allegations of Paragraph (20) of the Bill of Complaint. The defendants aver that said Third Party Subpœna and Plaintiff's demand for the delivery of the securities in its account with the defendants, accompanied by an offer to pay the debit balance thereof, have placed the defendants in the position of being required to prove the ownership of the securities which are held by them in accordance with the aforesaid agreements for the account of the All Continent Corporation, and they will therefore be required to assume a burden which cannot be properly undertaken by them; that said securities are subject to changing market conditions which may require the sale thereof to protect the interest of the defendants and any other party properly interested therein, and that said Third Party Subpœna may cause irreparable damage to the defendants if the defendants are not relieved from the restraint thereby imposed. That defendants have entered into said agreements with All Continent Corporation in good faith and have at all times believed that the securi-

ties in said account were actually the property of the plaintiff herein and the defendants therefore advanced substantial sums of money to All Continent Corporation and held said securities as collateral for their said advancements and interest due, and to become due, thereon.

Wherefore the defendants join in the prayer of the Bill [fol. 135] of Complaint and request Your Honorable Court to assume jurisdiction of the parties and the subject matter therein mentioned, so that the interests of all parties in said account of All Continent Corporation with the defendants, subject, however to the rights of the defendants therein, may be properly determined and adjudicated, and the defendants dismissed by Your Honorable Court from this suit, together with their costs.

And so Answers

John S. Wynn, James H. Wynn, Harold A. Longwell, E. Schuyler Jackson, Jr., Russell R. Hires, Archibald W. Austin, James B. Borden, Frederick W. Winterberg, J. Maurice Wynn, James A. Longwell, Co-partners Trading under the Firm Name of J. W. Sparks & Co., by John S. Wynn. Henry L. Schimpf, Jr., Attorney for said Defendants.

EXHIBIT "A" TO ANSWER

J. W. Sparks & Co.:

In consideration of your acting as my brokers for the purchase and sale of securities and/or contracts for commodities, and in opening or continuing an account or accounts for me, in which such transactions and all other of [fol. 136] my dealings, with you will be recorded, I, being of full age, agree with your firm as the same from time to time may be constituted, that:

All purchases and sales made for me shall be subject to the rules and customs of the Exchange or Market (and its Clearing House, if any) whereon such transactions are had, and when I do not immediately pay in full for securities and/or contracts which you may purchase for me, or immediately deliver certificates for the securities, and/or contracts which you may sell for me, and have the assistance of your facilities and credit in connection therewith, then at all times all securities (whether purchased for or de-

posited by me) and all equities in my account or accounts are pledged to you for all moneys advanced for and/or to me, and also shall stand as a protection to you for all liabilities incurred by the sale of any securities and/or contracts wherein delivery to you by me is pending and due and for any other obligations to you of whatever kind.

At any time, without notice to me, you may rehypothecate the securities so pledged by me, in any of your loans, separately or in common with other securities, and without limitation as to the amount of such loans, and you may register such securities in your own name and/or lend them to yourselves as brokers for delivery of like securities for the account of your other customers, and/or for re-lending them to other brokers. In all cases you may replace the certificates so used by other certificates of a similar issue and amount, but without the necessity of you at all times retaining such like securities in your possession and/or control for delivery.

I shall promptly provide and/or establish at least the required margin on any of my transactions wherein the Federal regulations limit the extension of credit; and at all times shall maintain in my account or accounts equity [fol. 137] or margin in accordance with Federal and/or New York Stock Exchange, and/or other Exchange requirements which may be applicable; but in all cases, whenever any such prescribed margin does not in your opinion afford you sufficient protection, then I shall provide and/or establish, promptly and/or maintain such additional equity or margin as will be satisfactory to you. If at any time any securities carried or held for me are unsatisfactory to you as loan collateral, then, without notice to me, you may disregard such securities in your determining equity and margin in any of my accounts with you. I shall be directly responsible to you for my account or accounts, whether designated by name or number or otherwise, and whether held individually or jointly with others. At any time in your discretion, you may without notice to me, apply and/or transfer any or all securities and/or contracts, and/or credits and equities interchangeably between any of my accounts, and/or from any of my accounts to any account carried by you which I have guaranteed in writing.

Upon your demand, I will take up or close my account or accounts by complete settlement of all indebtedness and

obligations due you thereon. You may, however, at any time you deem it necessary for your protection, at your discretion sell, without notice to me of your intent, and of time and place of sale, any or all of my securities, contracts, or commitments on the Exchange or other Market or place where such business is usually then transacted and/or at private sale, and without prior demand upon me for additional margin, and/or tender to or demand upon me for the taking up of my account or accounts. You may in like manner and under like conditions buy in any or all of my short commitments, and settle any of my obligations to you whatsoever, and in the event of my demise all the [fol. 138] provisions herein contained in respect to the liquidation and settlement by you of my account or accounts shall hold, whether or not my personal representative has been appointed. Any failure on your part to avail yourselves of the privileges or provisions herein set forth shall not be a waiver by you of any of your rights herein provided, but no waiver contained in this paragraph shall be deemed applicable to any transaction for which the Federal Law and Regulations make other provisions.

Notices of all purchases and sales, and statements of account current as rendered by you from time to time shall be deemed approved and accepted by me unless I immediately take exception thereto in writing, and when in your usual course of business you send any communication to me, either by mail and/or telegraph at the address as given below, or at my last address as known to you, I acknowledge and agree that such procedure on your part shall be considered by both of us as having the effect that such communication was received promptly by me.

If at any time my account or accounts shall be closed and re-opened, this agreement shall remain in full force and effect, and no waiver, modification, or alteration hereof shall be binding upon you unless confirmed in writing and signed by one of the members of your firm.

All Continent Corporation, Name by Eva Fox, President.

Communication to be sent to Eva Fox, Hotel Claridge, Atlantic City, N. J.

Business or Occupation ——.

Dated January 7th, 1936.

Witness Mona Fox, Secretary.

[fol. 139] EXHIBIT "B" TO ANSWER

Customer's Agreement

J. W. Sparks & Co.

GENTLEMEN:

I (We) hereby reaffirm the consent heretofore given by me (us) authorizing you to lend, to yourselves as brokers, or to others, any securities which you may be carrying for my (our) account or under my (our) control on margin.

This authorization shall apply to any and all accounts carried by you for me (us) or under my (our) control, and may be revoked by the undersigned at any time, by reasonable notice in writing.

All Continent Corporation, by (Signed) Eva Fox, President.

Dated January 7, 1936.

COMMONWEALTH OF PENNSYLVANIA,
City and County of Philadelphia, ss:

John S. Wynn, being duly sworn according to law, deposes and says, that he is one of the defendants in the above entitled proceeding; that he has full authority to, and hereby does file this Answer on behalf of the defendants therein mentioned, and that the facts set forth in the foregoing Answer are true and correct to the best of his knowledge, information and belief.

John S. Wynn.

Sworn to and subscribed before me this 19th day of October, 1936. A. C. Hackett, Notary Public. My commission expires 3/9/1939.

[fol. 140] In District Court of the United States for the Eastern District of Pennsylvania, June Term, 1936

In Equity. No. 9533

All Continent Corporation, Plaintiff,

v.

John S. Wynn, James H. Wynn, Harold A. Longwell, E. Schuyler Jackson, Jr., Russell R. Hires, Archibald W. Austin, James B. Borden, Frederick W. Winterberg, J. Maurice Wynn and James A. Longwell, Copartners Trading under the Firm Name of J. W. Sparks & Company; Capital Company, and Hiram Steelman, Trustee of the Estate of William Fox, a Bankrupt, Defendants

Notice of Motion of Capital Company

Now comes Capital Company, one of the defendants, in the above-entitled cause, appearing specially for the purpose set forth and for no other, and on the pleadings had herein moves the Court to quash the writ of subpoena, to vacate the Court's order dated the 8th day of September, [fol. 141] 1936, and to dismiss the Bill of Complaint insofar as said subpoena, order and Bill of Complaint relate to the said defendant, for the reason that this Court is without jurisdiction of this defendant, because this defendant is not a resident of the Eastern District of Pennsylvania or of the Commonwealth of Pennsylvania, and no valid service has been made on said defendant.

This defendant further moves that in the event the foregoing motion is denied, its time to appear, plead, answer or demur be extended for a period of 20 days from the filing of an order to that effect.

Benjamin O. Frick, Evans, Bayard & Frick, Attorneys for said defendant, Appearing herein specially and only for the purpose of this motion.

[fol. 142] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1936

No. 6253

ALL CONTINENT CORP., Appellant,

vs.

HIRAM STEELMAN, Trustee in Bankruptcy of William Fox, Appellee

And afterwards, to wit, the 13th day of November, 1936, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable J. Warren Davis and Honorable J. Whitaker Thompson, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 1st day of December, 1936, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 143] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1936

No. 6253

ALL CONTINENT CORPORATION, Appellant,

v.

HIRAM STEELMAN, Trustee in Bankruptcy of William Fox, Bankrupt, Appellee

Appeal from the District Court of the United States for the District of New Jersey

OPINION—Filed December 1, 1936

Before Buffington, Davis and Thompson, Circuit Judges

BUFFINGTON, Circuit Judge:

This is an appeal from a decree entered by the United States District Court for the District of New Jersey, hereinafter called the New Jersey Court, upon a bill filed by

the appellee, enjoining the appellant from prosecuting a suit in equity against him in the United States District Court [fol. 144] for the Eastern District of Pennsylvania, hereinafter called the Pennsylvania court. This suit was brought in the Pennsylvania Court to clear an encumbrance and cloud upon the title to certain securities held by J. W. Sparks & Co., brokers, with whom the appellant had an account. Sparks & Co. was joined as one of the defendants in the Pennsylvania suit. The other defendant, in addition to Sparks & Co. and the appellee, was the Capital Company, a corporation organized and existing under the laws of the State of California.

The appellee, who is trustee of the estate of William Fox, bankrupt, was joined as a party defendant in the Pennsylvania suit because it is contended that these securities with others whose title is in the appellant really belonged to William Fox, and now belong to the trustee of his estate in bankruptcy. Sparks & Co. was made a party because it has possession of the securities against which it has a claim for about $300,000 and in consequence is vitally interested in the question of their ownership. The Capital Company was made a party because it has a judgment against William Fox, and by means of certain supplementary proceedings in New York it has created a cloud upon the title of the securities.

The Capital Company claims these securities and in certain supplementary proceedings issued and served upon Sparks & Co., a subpœna under the authority of section 781 of the Civil Practice Act of New York which provides, among other things, that a "third person • • • is forbidden to transfer • • • property belonging to the judgment debtor • • • until further order of the court" and that anyone who violates "the provisions of such restraining provisions shall be subject to punishment [fol. 145] by the court by fine or imprisonment or either as and for a contempt". This created a serious situation for Sparks & Co. It had possession of property against which it had a claim for about $300,000, which no one disputes, but the same property is claimed by the Capital Company and the trustee in bankruptcy on the ground that it in fact belonged to William Fox and now is an asset of his estate in bankruptcy. All Continent Corporation requested Sparks & Co. to transfer some of these securities, but it re-

fused, because it could not afford to run the risk of being adjudged guilty of contempt and of the consequences thereof. The All Continent Corporation thereupon filed a bill in the Pennsylvania Court to clear the encumbrance and cloud upon the title to the securities pursuant to section 57 of the Judicial Code (Title 28 U. S. C. A. section 118), which among other things provides that:

"When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be."

Sparks & Co. filed an answer wherein it admitted that the securities were received by it from the appellant, that it had no knowledge that any of the securities belonged to William Fox and that it believed that they belonged to the [fol. 146] appellant, but that it refused to transfer any of them or to permit the appellant to deal in or with the account because the subpœna restrained it from so doing. In order to protect its own interest, it joined in the prayer of the bill and requested the court to determine the rights and interests of all parties in suit.

As above stated after the suit had been begun in the federal court in Pennsylvania, the appellee filed a petition in the New Jersey Court and prayed that the court enjoin the prosecution of the suit begun by the appellant in the Pennsylvania Court. No answer to the petition was filed, but a motion to dismiss the petition was filed by the All Continent Corporation. This the court denied and entered a decree enjoining the prosecution in the Pennsylvania Court against the trustee in bankruptcy. From this decree an appeal has been taken to this court.

The real question in issue here is whether or not the New Jersey Court had the power to enjoin the appellant from prosecuting its suit, under the facts in this case, in the Pennsylvania Court. The New Jersey court assumed and exercised jurisdiction on the ground that the continuance of the suit in the Pennsylvania Court would interfere with the orderly administration of the bankrupt estate which was proceeding under section 21 (a) of the Bankruptcy Act in the New Jersey Court.

Sparks & Co. is located in Philadelphia and has possession of the securities there, in the Eastern District of Pennsylvania. There is and can be no question about the jurisdiction of the Pennsylvania court. Under the facts in this case section 57 of the Judicial Code empowered the appellant to bring a suit to remove the encumbrance and cloud upon the title to the securities and since they were held in [fol. 147] the Eastern District of Pennsylvania by Sparks & Co. the suit was brought in the only court and district where it could be effectively maintained. Section 57 of the Judicial Code; In re Interocean Transportation Co. of America, Inc., 232 Fed. 408; In re Green, 207 Fed. 693; Copeland v. Martin, 182 Fed. 805. That being true in order to justify the action of the New Jersey Court, it must clearly appear that it had sound legal grounds to restrain the proceedings properly brought under the authority of the Judicial Code in the Pennsylvania Court. There is no merit in the contention that the Pennsylvania court was not restrained, but only one of the litigants, for the restraint of a proper party is legally tantamount to the restraint of the court itself. Several grounds have been alleged to justify the restraint.

As stated above, the court based the restraint upon the ground of unlawful interference with the orderly administration of the bankrupt estate. Just how the removal of the cloud upon the title to the securities by the only court that can do so will interfere with the administration of the estate does not appear, for it was admitted at the argument before us that within a week after the argument in the New Jersey Court of the motion for restraint, on the ground that the suit in the Pennsylvania Court would interfere with his administration and that he was not prepared to defend the suit, the trustee filed a bill seventy pages long

in the Court of Chancery of New Jersey against the appellant and other defendants covering, so far as the appellant is concerned, substantially the same controversy that is involved in the Pennsylvania Court. This bill in the Court of Chancery, while having no bearing upon the conclusion reached in this opinion, really sets forth two separable controversies. By the one between the trustee and the appel- [fol. 148] lant, the trustee seeks to obtain all the property claimed by the appellant and in this the appellant is the only necessary party defendant; by the other, he seeks to set aside a certain trust agreement and in this the other defendants are the only necessary parties defendant.

The trustee did not specifically allege that the identical securities held by Sparks & Co. belong to Fox, but did say that all of the assets of the appellant belonged to Fox; and as a matter of fact the securities in controversy here are a part of the appellant's property alleged to belong to Fox. In order for the trustee to establish his ownership of all the property of the appellant including the securities in the possession of Sparks & Co., on the ground that it in fact belonged to Fox, it is necessary for him to prove all of his averments in his bill in the Court of Chancery which relate to the appellant. The same proof will have to be made in the Pennsylvania Court as to the securities here in question. Under these circumstances, a decree made in favor of appellee in the Pennsylvania suit could only be based upon a finding by that court that all of the assets of the appellant belong to the appellee. Such a finding would be binding and conclusive upon appellant, not only in the Pennsylvania court, but in every other court in which that question might be litigated between the parties. Under these circumstances, the Pennsylvania Court having first acquired jurisdiction of the property and controversy is entitled to exclusive jurisdiction and the institution of the suit in chancery was an attempt to oust the Pennsylvania court of the jurisdiction which it had previously and validly acquired. The appellant is entitled to maintain the exclusive jurisdiction which it thus acquired under the authority of section 57 of the Judicial Code and may, upon proper application, restrain the trustee from litigating the controversy else- [fol. 149] where. Ward et al. v. Foulkrod, et al. 264 Fed. 627; Franz v. Franz, et al. 15 Fed. (2) 797 (certiorari denied in 273 U. S. 756).

The institution of the proceedings in the New Jersey Court by which the trustee secured the injunction against the appellant is based upon the assumption that the securities in the possession of Sparks & Co. belong to the estate of William Fox in bankruptcy. The Capital Company has been and is seeking to get these securities, not for the creditors as a whole but for itself. The action to do this was begun long before Fox became a bankrupt and by supplementary proceedings in New York the cloud upon the title to them has been created. The claim of that company is accordingly adverse to the interests of the trustee who represents all the creditors generally. It is, therefore, not only his right to appear in the Pennsylvania court and defend that suit, but it is his official duty, and neglect or failure to do so would be a clear breach of that duty.

The trustee argues that the bankruptcy court acquired jurisdiction over these securities in case they should subsequently "be determined to be the property of the bankrupt", and, therefore, the suit in the Pennsylvania Court against him should have been restrained. That entirely begs the question and such law would prevent every plenary suit. The question is the determination of the ownership of the property by a plenary suit which had been properly brought in the Pennsylvania court. The trustee is improperly attempting to try the same controversy by a plenary suit in the Court of Chancery after the Pennsylvania Court had acquired exclusive jurisdiction.

Under the facts in this case, the District Court of New Jersey did not have power to restrain the suit which the statute clearly authorized to be brought in the Pennsylvania court.

[fol. 150] The order restraining the appellant from proceeding with its suit against the trustee in the Pennsylvania court is accordingly reversed and appellant is permitted to proceed with its suit.

A true Copy. Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 151] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1936

No. 6253

ALL CONTINENT CORP., Appellant,

vs.

HIRAM STEELMAN, Trustee in Bankruptcy of William Fox, Appellee

Appeal from the District Court of the United States, for the District of New Jersey

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the order of the said District Court restraining the All Continent Corporation from proceeding with its suit against the Trustee in Bankruptcy of William Fox in the Pennsylvania Court be, and the same is hereby reversed, with costs.

Philadelphia, December 1, 1936.

Per Curiam.

Buffington, Circuit Judge.

Endorsements: Order Reversing Order of District Court. Received & Filed Dec. 1, 1936. Wm. P. Rowland, Clerk.

[fol. 152] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Supplemental Record and proceedings in this Court in the case of All Continent Corp., Appellant, vs. Hiram Steelman, Trustee in Bankruptcy of William Fox, Appellee, No. 6253,

on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 29th day of December in the year of our Lord one thousand nine hundred and thirty-six and of the Independence of the United States the one hundred and sixty-first.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)

[fol. 153] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 15, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Cricuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 41,178. U. S. Circuit Court of Appeals, Third Circuit. Term No. 638. Hiram Steelman, Trustee in Bankruptcy of William Fox, a bankrupt, petitioner, vs. All Continent Corporation. Petition for a writ of certiorari and exhibit thereto. Filed January 11, 1937. Term No. 638, O. T., 1936.

In the

Supreme Court of the United States

October Term, 1936 No. [illegible]

HIRAM STEELMAN, Trustee in Bankruptcy
of WILLIAM FOX, a Bankrupt,

Petitioner,

vs.

ALL CONTINENT CORPORATION,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit, and Brief in Support Thereof

WM. ELMER BROWN, Jr.
Attorney for Petitioner,
Guarantee Trust Building,
Atlantic City, New Jersey

M 38

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1936. No.

HIRAM STEELMAN, TRUSTEE IN BANKRUPTCY OF WILLIAM FOX, A BANKRUPT,

Petitioner,

VS.

ALL CONTINENT CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

PETITION

Your petitioner, HIRAM STEELMAN, trustee in bankruptcy of William Fox, a bankrupt, respectfully shows:

This is a petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Third Circuit to review a decision reversing a decree of the United States District Court for the District of New Jersey, in bankruptcy, enjoining prosecution by respondent of a suit in the United States District Court for the Eastern District of Pennsylvania against petitioner, as trustee in bankruptcy of William Fox.

I

STATEMENT

William Fox was adjudicated a bankrupt on May 29, 1936, by the United States District Court for the District of New Jersey (hereinafter called "bankruptcy court"). Your petitioner was appointed trustee in bankruptcy, and duly qualified as such (R. 12, 13).

Respondent, All Continent Corporation (a Delaware corporation), appeared in said bankruptcy proceeding and filed proof of claim as an alleged creditor of William Fox (R. 20).

The only assets turned over to your petitioner, as trustee, consisted of $100 in cash and certain notes and securities of little or no value. Listed liabilities were in excess of $9,000,000 (R. 20).

Orders were entered directing examination of the respondent, and certain of its officers, directors, accountants and bookkeepers pursuant to Section 21 (a) of the Bankruptcy Act. Respondent's president (wife of the bankrupt) refused to submit to such examination and was cited for contempt by the referee (R. 13, 17, 18).

In the course of the examinations under Section 21 (a), the referee found that a thorough examination and audit of the respondent's books was "absolutely necessary to the proper administration of the estate

of the bankrupt" (R. 14-16). This conclusion was based upon the following facts, as summarized by the referee (R. 14-16), which had appeared concerning the relationship between respondent and the bankrupt:

> "The All Continent Corporation, whose books and records are here sought to be examined, was the creation of the bankrupt himself; every dollar of its capital came from the bankrupt; by the formation of the corporation, he divested himself of a very substantial portion of his property; all of its capital stock, now allegedly owned by the wife of the bankrupt, has never been transferred upon the books of the corporation, and the bankrupt still appears as the record holder thereof; from the time of the formation of the corporation, the bankrupt retained in his possession and under his control, the securities forming the assets of the corporation; in numerous instances, the bankrupt dealt with the assets of corporation as his own; the bankrupt from the time of the formation of the corporation, had power of attorney to act for it with extremely broad powers; the bankrupt was undoubtedly the guiding spirit in all of the affairs of the corporation throughout its entire corporate existence; the books and records already in evidence disclose that the corporation made disbursements for the account of the bankrupt and various corporations owned by him, and that the major portion of the transactions of the corporation were transactions of this type, or transactions in

> which the bankrupt or the corporations which he owned, were involved; * * * ; this chain of facts and circumstances and many others in the record of testimony already adduced, demonstrate clearly that the affairs of the All Continent Corporation were so related to and intertwined with the property and affairs of the bankrupt as to render absolutely necessary to the proper administration of the estate of the bankrupt a complete and thorough examination and audit by the trustee of the books and records of the All Continent Corporation." (R. 14-16)

Accordingly, the referee ordered respondent to make its books available for such examination. Proceedings by respondent to review said order are now pending (R. 16, 17).

At this point, respondent brought a suit in the United States District Court for the Eastern District of Pennsylvania (hereinafter called the "Pennsylvania suit") in which respondent joined your petitioner as an absentee defendant pursuant to Section 57 of the Judicial Code (R. 23-36). The stated purpose of the Pennsylvania suit was to remove a cloud on title to certain securities in the possession of Philadelphia brokers. The alleged cloud on title consisted of a third-party order, obtained on March 27, 1936, in supplementary proceedings by Capital Company, a judgment creditor of William Fox, which third-party order contained an injunction restraining the brokers from

transferring any property of William Fox, the judgment debtor. (R. 34-36)

On September 9, 1936 (the day set for hearing on the review of said referee's order directing respondent to submit its books for audit) your petitioner, as trustee, though not an inhabitant of, or found within the Eastern District of Pennsylvania, was served with a subpoena issued out of the United States District Court for the Eastern District of Pennsylvania, in the Pennsylvania suit (R. 18, 37-38). On September 18, 1936, petitioner, not having been found within said Eastern District of Pennsylvania and not having voluntarily appeared in the Pennsylvania suit, was served with a copy of an order to plead entered in said proceedings (R. 18, 37-38).

On application of your petitioner, as trustee, the bankruptcy court, being of the opinion that the trustee was improperly made a defendant in said Pennsylvania suit, and "that the prosecution of said suit against said trustee would interfere materially with the proper and orderly administration of the affairs of this bankrupt estate", enjoined and restrained respondent from further prosecuting said Pennsylvania suit against the trustee (R. 44, 45).

On appeal from the said restraining order, the Circuit Court of Appeals, over objection of petitioner, permitted respondent to incorporate into the record on this appeal the bill of complaint in a suit instituted by your petitioner, as trustee, in the Chancery Court of New Jersey subsequent to issuance by the bankruptcy

court of the said restraining order (which is the subject of the appeal here involved). The New Jersey suit was brought against respondent, the bankrupt, and members of the bankrupt's family, and sought, among other things, to recover all of the property of respondent, and all the capital stock of respondent, as property of the bankrupt estate, on the following grounds: (a) that respondent has no separate existence or identity and in fact is merely the bankrupt himself doing business under the guise of the corporate form; (b) that the original transfer of assets of a then market value of $7,000,000, together with all subsequent transfers, from the bankrupt to respondent were colorable only; (c) that the original transfer of the $7,000,000, together with all subsequent transfers, from the bankrupt to respondent were made without consideration and in fraud of creditors of the bankrupt; (d) that the purported transfer from the bankrupt to his wife of all the stock of respondent was colorable only, and (e) that the said purported transfer from the bankrupt to his wife of all of the stock of respondent was made in fraud of the creditors of the bankrupt (R. 51-123).

The Circuit Court of Appeals reversed the decree of the bankruptcy court, vacated the restraining order, and dismissed petitioner's said application therefor on the ground that the court in the Pennsylvania suit had acquired exclusive jurisdiction by virtue of Section 57 of the Judicial Code and that the bankruptcy court was without power to enjoin respondent from further prosecuting the Pennsylvania suit against the trustee.

It is this decree of the Circuit Court of Appeals which your petitioner now seeks to have reviewed.

In the course of its opinion, the Circuit Court of Appeals undertook to discuss not only the issue before it, but also to review the matter contained in the supplemental record and to express its views by *obiter dicta* upon numerous questions which have arisen or are likely to arise hereafter between respondent and your petitioner with respect to said Chancery Court suit and other proceedings. This phase of the case is discussed subsequently and more in detail (see pp. 10-12, *infra*). Suffice it to say here that of six objectionable *dicta,* five deal with matters not before the court, and the sixth concerned a collateral question unconnected with the issue on appeal.

II

QUESTION PRESENTED

The question is whether a court of bankruptcy has power to enjoin a creditor from prosecuting, as against the trustee, a suit, under Section 57 of the Judicial Code (Act of Cong., Mar. 8, 1875, c. 137, § 8, 18 Stat. 472; R. S. §§ 738, 742; 28 U. S. C. A. § 118) brought subsequent to the adjudication, in a foreign jurisdiction, where the bankruptcy court determines (1) that the trustee was improperly made a party to such suit and (2) that prosecution of said suit against the trustee would constitute an interference with the orderly administration of the bankrupt estate.

III

REASONS FOR GRANTING THE WRIT

1. This case presents an important question of Federal law involving an interpretation of Section 57 of the Judicial Code as a limitation upon the inherent powers of a court of bankruptcy to protect its jurisdiction under the Bankruptcy Act. This question has not been, but should be, passed upon by this Court.

In the suit brought by respondent under Section 57 of the Judicial Code, the cloud on title sought to be removed is alleged to be a certain restraining order procured by another creditor. There is no claim that the trustee by his act or conduct created any cloud on title other than or in addition to whatever interest the trust estate might have in the restraining order procured by the other creditor.

It further appears that the respondent, as an alleged creditor, had theretofore appeared and filed proof of claim in the bankruptcy proceedings, the determination of which claim necessarily involved the issues which respondent now seeks to have tried in the foreign suit, and that the respondent is a corporation created by, and probably dominated and controlled by, the bankrupt, and against whom the trustee has substantial claims for the recovery of property which probably belongs to the bankrupt estate.

If, as held by the Circuit Court of Appeals, Section 57 of the Judicial Code gives respondent an absolute right with which the bankruptcy court is powerless to interfere, such interpretation will enable any fraudulent transferee, having personal property in his possession to which the trustee may assert claim, to compel such trustee to litigate the controversy in any jurisdiction to which the fraudulent transferee may choose to remove the property. Especially is this true if, as in effect held by the Circuit Court of Appeals, the mere existence of bankruptcy proceedings, or of examinations under Section 21 (a) of the Bankruptcy Act, in themselves constitute a cloud on title within the meaning of Section 57 of the Judicial Code.

The facility with which personal property such as is here involved can be moved about from place to place and secretly taken into different jurisdictions at the will of the fraudulent transferee, provides, if the decision of the Circuit Court of Appeals is not reversed, a simple device whereby the effective enforcement of the Bankruptcy Act may be seriously endangered. The fraudulent transferee, who may in fact be merely the bankrupt himself doing business in the corporate form, may take all of the property of the bankrupt into a foreign jurisdiction and there bring an action to destroy possible claims of the trustee as constituting clouds upon title. Under the decision of the Circuit Court of Appeals, the bankruptcy court is powerless to prevent such action, protect its trustee or to protect the administration of the bankrupt estate,

and this despite the fact that the fraudulent transferee has previously appeared in the bankruptcy proceedings and has filed a claim therein.

Section 57 of the Judicial Code, besides being nationwide in effect and application, is the Federal counterpart of statutes which have been enacted in almost every state in the Union. Thus the decision with respect to Section 57 affects similar suits under the statutes of the various states.

2. It is further submitted that the action of the Circuit Court of Appeals in passing upon pending and potential questions not before the court but concerning proceedings in the Chancery Court of the State of New Jersey, in the District Court of the United States for the District of New Jersey, and in the District Court of the United States for the Eastern District of Pennsylvania, has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision. Such *dicta* are inevitably prejudicial and have been delivered with respect to issues not involved in the appeal and upon which your petitioner has had no opportunity to be heard.

In its opinion the Circuit Court of Appeals, although stating that the New Jersey Chancery bill had "no bearing upon the conclusion reached in this opinion", nevertheless undertook to state (a) that the only controversy between petitioner and respondent in the New Jersey Chancery suit is a separable one (thereby in

effect ruling that such suit is removable to the Federal court) (R. 146); (b) that the result of the Pennsylvania suit would be *res judicata* against respondent of all issues arising between petitioner and respondent in the New Jersey Chancery suit (thereby in effect ruling that if petitioner defends the Pennsylvania suit its result will be *res judicata* against him) (R. 146); (c) that the New Jersey Chancery suit is an improper attempt by petitioner to oust the Pennsylvania court of its jurisdiction (thereby in effect ruling that respondent may prevent such suit) (R. 146); (d) that upon proper application respondent is entitled to enjoin your petitioner from "litigating the controversy elsewhere" (thereby in effect ruling that upon application to the Pennsylvania court respondent is entitled to enjoin petitioner from prosecuting the New Jersey Chancery suit) (R. 146); and (e) that the restraint of a proper party is legally tantamount to a restraint of the court itself (thereby in effect ruling that upon the issuance of an injunction against petitioner, the New Jersey Chancery court would itself be restrained) (R. 145). In addition, the Circuit Court of Appeals stated that it was the official duty of your petitioner to appear in and defend said Pennsylvania suit, thereby in effect ruling that the bankruptcy court must order your petitioner personally to appear in said Pennsylvania suit (R. 147).

When the above issues arise from time to time in the lower courts your petitioner will point out that each of such statements is erroneous in law and will, of

course, take the position that they are mere *obiter* and nothing more. Nevertheless, in view of the high source of such *dicta*, it will be obviously difficult, if not impossible, for your petitioner to obtain the strictly impartial hearing to which he is entitled. Particularly is this true with respect to the United States District Court for the District of New Jersey* and the United States District Court for the Eastern District of Pennsylvania, both of which are under the direct appellate supervision of the court rendering the *dicta*.**

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*The *dictum* with respect to the "separable" nature of the controversies involved in the New Jersey Chancery suit is particularly objectionable. This same Circuit Court of Appeals has recently held that an order of remand based on jurisdictional grounds, of which non-separability is one, may not be reviewed by the Circuit Court of Appeals either on appeal or by mandamus. See *Bankers Securities Corp. v. Insurance Equities Corp.*, 85 F. (2) 856.

**Your petitioner's concern respecting the effect of these *dicta* is not unsubstantial. On December 1, 1936 (the day upon which the *dicta* were handed down), the United States District Court for the Eastern District of Pennsylvania enjoined your petitioner from prosecuting the New Jersey action. On December 11, 1936, stating that it was bound by the *dicta*, said Court overruled your petitioner's objection to the jurisdiction and made said injunction permanent. Furthermore, also on December 1, 1936, respondent instituted proceedings to remove the New Jersey action to the Federal Court on the ground that there was a separable controversy.

In consequence of the foregoing conduct of the Circuit Court of Appeals, your petitioner has, in substance, been deprived of his day in court and, without any opportunity to be heard, has been foreclosed both in the lower courts and upon appeal to this same Circuit Court of Appeals on each of the questions above discussed. Your petitioner earnestly submits that quite apart from whatever conclusion this Court may reach as to the merits of the controversy now on appeal, these *dicta* require the exercise by this Court of its supervisory power.

WHEREFORE your petitioner, referring to the attached brief in support of the foregoing reasons for granting the writ, respectfully prays that this Honorable Court issue a writ of *certiorari*, directing the United States Circuit Court of Appeals for the Third Circuit to certify and send to this Court a full and complete transcript of the record herein to the end that the said case may be reviewed and determined by this Court, as provided by law, and that so much of the judgment of the United States Circuit Court of Appeals for the Third Circuit as is here involved may be reversed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray.

HIRAM STEELMA
Trustee in Bankruptcy of
William Fox, a Bankrupt.

BRIEF IN SUPPORT OF PETITION

I

OPINIONS BELOW

The opinion of the Circuit Court of Appeals (R. 142-147) has not yet been reported.

The opinion of the United States District Court for the District of New Jersey (R. 41-44) has not been officially reported.

II

JURISDICTION

The final decree of the Circuit Court of Appeals is dated December 1, 1936 (R. 148). Petition for *certiorari* is brought pursuant to Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (Act of Cong., Feb. 13, 1925, c. 229 § 1; 43 Stat. 938; 28 U. S. C. A. § 347) and Section 25 of the Bankruptcy Act of 1898 (Act of Cong., July 1, 1898, c. 541, § 25; 30 Stat. 553; 11 U. S. C. A. § 48).

III

STATEMENT OF THE CASE

This has already been stated under Heading I of the petition, and said statement, in the interest of brevity is hereby adopted and made a part of this brief.

IV

SPECIFICATON OF ERRORS

1. The Circuit Court of Appeals erred in holding that the bankruptcy court had no power to enjoin respondent from further prosecution of the Pennsylvania suit against the trustee.

2. The Circuit Court of Appeals erred in reversing the decree of the United States District Court for the District of New Jersey, in vacating the injunction of said District Court and in denying to your petitioner the relief sought in his petition.

3. The Circuit Court of Appeals erred in allowing respondent to include in the record on appeal matters arising subsequent to the decree of the United States District Court for the District of New Jersey and erred in considering and passing upon such matters.

V

ARGUMENT

The statute involved is Section 57 of the Judicial Code, which provides in part as follows (Act of Cong., Mar. 8, 1875, c. 137 § 8; 18 Stat. 472 R. S. §§ 738, 742; 28 U. S. C. A. § 118):

> "When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, * * * In case such absent defendant shall not appear, plead, answer, or demur within the time so limited * * *, and upon proof of the service * * * of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to

the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; • • • "

A.

BANKRUPTCY COURT HAS INHERENT POWER TO PROTECT THE EXERCISE OF ITS JURISDICTION UNDER THE BANKRUPTCY ACT BY INJUNCTION.

As said in *Continental Illinois Nat. Bk. & Tr. Co. v. Chicago, R. I. & Pac. Ry. Co.*, 294 U. S. 648, 675:

" • • • By § 2 of the Bankruptcy Act (U. S. C. title 11, § 11), courts of bankruptcy are invested 'with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings.' They are essentially courts of equity, and their proceedings inherently proceedings in equity, the words 'at law' probably having been inserted only with regard to clause (4) of § 2, which confers authority to arraign, try, and punish bankrupts and others for violations of the act. *Local Loan Co. v. Hunt*, 292 U. S. 234, 240. Their adjudications and orders

constitute in all essential decrees in equity. *Idem,* 241. The power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is, therefore, inherent in a court of bankruptcy, as it is in a duly established court of equity. Section 262 of the Judicial Code, which authorizes the United States courts 'to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions' recognizes and declares the principle * * * "

"Moreover, by § 2 (15) of the Bankruptcy Act (U. S. C. title 11, § 11), courts of bankruptcy are invested with such authority in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings, including the power to 'make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this act.' * * * "

See also, *Local Loan Co. v. Hunt,* 292 U. S. 234, 239-241.

In so far as it held that Section 57 of the Judicial Code gave respondent an absolute right with which the bankruptcy court had no power to interfere, the decision is clearly wrong. See Section 262 of the Judicial Code (Act of Cong., Mar. 3, 1911, c. 231 § 262, 36 Stat. 1162; R. S. § 716; 28 U. S. C. A. § 377) and Section 2 (15) of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, § 2, 30 Stat. 548; 11 U. S. C. A. § 11).

B.

BANKRUPTCY COURT, IN ORDER TO PREVENT DEFEAT OR IMPAIRMENT OF ITS JURISDICTION, PROPERLY ENJOINED RESPONDENT FROM PROSECUTION OF THE PENNSYLVANIA SUIT AGAINST THE TRUSTEE.

1. The United States District Court for the Eastern District of Pennsylvania did not acquire exclusive jurisdiction over any controversy between the trustee and respondent.

Institution by respondent of the Pennsylvania suit was for the stated purpose of removing an alleged cloud on title of certain securities. Jurisdiction was not acquired in the absence of existence of an encumbrance or lien which in legal contemplation constitutes a cloud upon title. *Willing v. Chicago Auditorium,* 277 U. S. 274, 288; *Devine v. Los Angeles,* 202 U. S. 313, 334-335.

In its bill of complaint in the Pennsylvania suit, the respondent did not allege the creation by the trustee in bankruptcy of any lien or encumbrance upon the securities. The alleged cloud on title relied upon by respondent to sustain the jurisdiction of its bill comprises a lien or encumbrance created by a creditor prior to adjudication of the bankrupt.

In its bill of complaint in the Pennsylvania suit, the respondent alleged, in effect, that it had delivered certain securities to a broker in Philadelphia; that

Capital Company, on June 18, 1935, procured judgment by confession against William Fox in the United States District Court for the Southern District of New York; that on March 27, 1936, Capital Company served upon the broker a subpoena for examination of third parties (hereinafter called "third-party subpoena") in proceedings supplemental to said judgment, under authority of the Civil Practice Act of New York, which third-party subpoena had endorsed thereon a provision providing, in part, that "the third person * * * is forbidden to transfer * * * property belonging to the judgment debtor * * * until further order of the court"; that said injunction is still in full force and effect; that in proceedings upon motion to vacate the third-party subpoena, Capital Company filed affidavits averring that it had reason to believe that the securities were in fact the property of William Fox; and that Capital Company has consistently claimed that the securities were in fact the property of William Fox and not that of respondent.

Obviously, the foregoing allegations are wholly insufficient to sustain jurisdiction of any claim as against the trustee. Appreciating this, the respondent has endeavored to lend colorable basis for jurisdiction as against the trustee by alleging, in effect, that subsequent to the adjudication of the bankrupt, the petitioner, as trustee, appeared before the bankruptcy court and joined in an application to have the third-party subpoena proceedings and the injunction contained in said third-party subpoena continued, not-

withstanding pendency of the bankruptcy proceedings, as a result of which the bankruptcy court "permitted the said third-party subpoena proceedings and the injunction contained therein to continue; and since the date of his appointment as such trustee [he] has ratified and approved in all respects the procedure followed by the Capital Company, as aforesaid, with reference to the said third-party subpoena and the injunction contained therein."

But the foregoing allegations are wholly insufficient to confer jurisdiction as against the trustee, as distinct from the creditor. On the facts alleged the trustee has created no cloud upon title but has merely not opposed, for the time being, continuation by a creditor of a third-party subpoena served prior to adjudication of the bankrupt.

2. The bankruptcy court first acquired exclusive jurisdiction over the only issue involved in the Pennsylvania suit between Capital Company and the trustee.

Immediately upon the adjudication of William Fox a bankrupt, on May 29, 1936, the bankruptcy court became vested with exclusive jurisdiction over any controversy between Capital Company and the trustee with respect to the validity of the former's lien or whether enforcement thereof shall be for the sole benefit of Capital Company or for the benefit of the bankrupt estate. Such exclusive jurisdiction having thus attached, the Pennsylvania court was without power

thereafter to acquire jurisdiction over this controversy without consent of the bankruptcy court.

That the above is the only possible issue in the Pennsylvania suit as between Capital Company and the trustee, is evident. If respondent is successful in its attempt in the Pennsylvania suit to remove the restraint contained in the third-party subpoena as a cloud upon title to the securities, there can be no controversy between Capital Company and the trustee. If, however, respondent is unsuccessful and Capital Company sustains its third-party subpoena by showing that the said securities are in fact the property of the bankrupt, the trustee for the first time will then become involved in a controversy with Capital Company over enforcement of alleged lien against property of the bankrupt. Over this controversy the bankruptcy court has exclusive jurisdiction. *Isaacs v. Hobbs Tie & T. Co.*, 282 U. S. 734, 738-739; *Straton v. New*, 283 U. S. 318, 321. Under such circumstances there can be no doubt but that the bankruptcy court could enjoin determination in the Pennsylvania suit of that controversy. *A fortiori* it may now enjoin in advance assumption of unwarranted jurisdiction to determine such potential controversy.

3. Bankruptcy court first acquired jurisdiction of issue as to identity of bankrupt and respondent.

Upon appearing and filing proof of claim in the bankruptcy proceedings, respondent thereby submitted

to the jurisdiction of the bankruptcy court the determination of all questions concerning the validity of said claim. In view of the facts brought out before the bankruptcy court as to relationships between the bankrupt and the respondent, it is obvious that one of the principal issues presented by respondent's proof of claim is whether respondent is a mere instrumentality of the bankrupt. Cf. *Edward Finch Co. v. Robie,* 12 F. (2d) 360; 4 Remington on Bankruptcy (4th Ed., 1935), Section 1538. Although it does not appear in the record that such objection has been made to respondent's claim, nevertheless this fact may be inferred in view of the allegations contained in petitioner's bill of complaint in the Chancery Court of New Jersey (R. 52-123), which was incorporated into the record on appeal on motion of respondent over petitioner's objection (R. 51, 52).

Thus, long prior to the institution of the Pennsylvania suit, the bankruptcy court acquired *in personam* jurisdiction of respondent to determine the question as to whether or not respondent and the bankrupt are one and the same. This controversy the Circuit Court of Appeals has held to be inherent as petitioner's defense in the Pennsylvania suit (R. 146).

The fact that plenary suit might ultimately be required to compel respondent as an adverse claimant to surrender property to the trustee does not detract from the inherent power of the bankruptcy court to pass upon all questions arising in connection with the validity of respondent's claim. See *Bronx Brass*

Foundry, Inc. v. Irving Trust Co., Trustee, 297 U. S. 230, 231; compare *Alexander v. Hillman,* 296 U. S. 222 (holding that filing proof of claim in receivership proceedings is submission to jurisdiction of court for purpose of counterclaim against creditor to recover property belonging to estate).

Such issues being already before the bankruptcy court, it was within the discretion of that court to determine whether such issues should be litigated either in the bankruptcy court, or in a plenary suit directed to be brought by the trustee, or whether it would be in the interests of the bankrupt estate for the trustee to appear and litigate these issues in the Pennsylvania suit brought by respondent.

The Pennsylvania suit at most involved only issues as to ownership of a part of the property now in the possession of respondent, and, of course, could not involve the ownership of respondent's capital stock. Therefore, regardless of the outcome of the Pennsylvania litigation, it would in any event be necessary for the trustee to institute plenary suit in order to determine ownership of all the stock of respondent, as well as to determine the ownership of all the remainder of respondent's property not specifically in issue in the Pennsylvania suit.

The bankruptcy court, in the exercise of its discretion, therefore, properly enjoined needless litigation in the Pennsylvania suit and thereafter in the exercise of its discretion quite properly authorized the trustee to institute the plenary suit in the New Jersey

Chancery Court (R. 123). This New Jersey suit is obviously more appropriate under the circumstances in that it will determine all controversies and avoid a multiplicity of suits.

4. Bankruptcy court properly enjoined respondent on ground that respondent was dominated and controlled by the bankrupt.

While the bankruptcy court may not exercise summary jurisdiction to obtain property adversely held by respondent, unless claim of title be merely colorable, it is submitted that upon adequate showing that respondent is controlled and dominated by the bankrupt, the bankruptcy court has inherent jurisdiction to restrain the bankrupt from instituting, through the agency of respondent, vexatious litigation for the purpose of interfering with orderly administration of the bankrupt estate.

C.

REGARDLESS OF THE MERITS OF THE PRECISE ISSUE ON APPEAL, THIS COURT SHOULD EXERCISE SUPERVISORY POWER IN ORDER TO RELIEVE THIS PETITIONER FROM THE PREJUDICIAL EFFECTS OF THE DICTA CONTAINED IN THE OPINION OF THE CIRCUIT COURT OF APPEALS.

Respectfully submitted,

Wm. Elmer Brown, Jr.
Counsel for Petitioner.

In the

Supreme Court of the United States

October Term, 1936 No. .

HIRAM STEELMAN, Trustee in Bankruptcy
of WILLIAM FOX, a Bankrupt.

Petitioner,

vs.

ALL CONTINENT CORPORATION.

Respondent.

Petition for a Temporary Restraining Order and for Temporary Injunction and Memorandum in Support Thereof

WM. ELMER BROWN, Jr.,
Counsel for Petitioner,
Guarantee Trust Building,
Atlantic City, New Jersey.

IN THE

SUPREME COURT OF THE UNITED STATES

In the Matter of
WILLIAM FOX,

Bankrupt,

HIRAM STEELMAN, Trustee in Bankruptcy of William Fox, a Bankrupt,

Petitioner

—against—

ALL CONTINENT CORPORATION,

Respondent

PETITION FOR A TEMPORARY RESTRAINING ORDER AND FOR TEMPORARY INJUNCTION MEMORANDUM IN SUPPORT THEREOF

To the Honorable Benjamin N. Cardozo, Associate Justice of the Supreme Court of the United States:

Your petitioner, Hiram Steelman, as Trustee in Bankruptcy of the Estate of William Fox, a Bankrupt, prays for the issuance of a temporary restraining order and a temporary injunction, without the giving of a bond or other security by your petitioner, against the respondent All Continent Corporation, its officers,

agents, attorneys and employees, pending the final decision of this Court upon the petition for a writ of certiorari duly filed this day by your petitioner in the above entitled cause.

Your petitioner prays that respondent, All Continent Corporation, its officers, agents, attorneys and employees, be restrained and enjoined, pending final determination of the petition for a writ of *certiorari,* as aforesaid, from proceeding in any manner or taking any action against your petitioner in a certain suit now pending in the United States District Court for the Eastern District of Pennsylvania, entitled "All-Continent Corporation, Plaintiff, v. John S. Wynn, et al., Defendants," in Equity, No. 9533.

The facts with respect to said petition for a writ of *certiorari,* as well as the said suit pending in the United States District Court for the Eastern District of Pennsylvania, are set forth in said petition. In the interest of brevity your petitioner incorporates herein the allegations and contents of said petition, a copy of which is annexed hereto marked Exhibit "A".

The grounds and reasons for this application are that unless a temporary restraining order and temporary injunction are issued by this Court, irreparable injury is likely to result to your petitioner and any relief to which your petitioner may be entitled upon his said petition for a writ of *certiorari,* may be effectively nullified.

The prosecution by All Continent Corporation of any proceedings against your petitioner in the said

action pending in the United States District Court for the Eastern District of Pennsylvania (hereinafter referred to as the Pennsylvania action) was enjoined and restrained by order of the United States District Court for the District of New Jersey. That order was reversed by the United States Circuit Court of Appeals. This final decree of reversal is the matter which your petitioner now seeks to have reviewed by this Court, as set forth in his petition for writ of *certiorari*.

Your petitioner has not appeared in the said Pennsylvania action and has interposed no answer therein. Your petitioner is now in default in said action.

Thus, unless a restraining order and temporary injunction are issued, a decree *pro confesso* against your petitioner may be taken by respondent, with a final default judgment resulting therefrom. In addition to the effect of such a default judgment with respect to the securities which are the subject matter of said Pennsylvania action, a default judgment taken therein may include findings of fact at least prejudicial to your petitioner in other litigations.

As appears in the petition for a writ of *certiorari*, your petitioner has instituted proceedings against All Continent Corporation in the Chancery Court of New Jersey seeking to recover all the property of All Continent Corporation as property of the bankrupt estate. A default judgment in the Pennsylvania action might contain findings of fact which, in substance, would be of respondent's own choosing. Without going into the

effect of such findings of fact it is submitted that such action by respondent should be restrained until this Court shall have had the opportunity to pass upon the petition for a writ of *certiorari*.

If All Continent Corporation, the respondent, herein and the plaintiff in the Pennsylvania action, be not enjoined from entering such a default judgment, the grant of your petitioner's writ of *certiorari* and the reversal of the decree of the United States Circuit Court of Appeals by this Court would be of no value to your petitioner. In such case, even though this Court should find that all proceedings against your petitioner by All Continent Corporation in the said Pennsylvania action were properly restrained, and that the restraint thereof should be reinstated and continued, nevertheless All Continent Corporation, as plaintiff in that action, would have secured all the relief against your petitioner which it could have secured had said proceedings not been restrainable.

Your petitioner has heretofore applied to the United States Circuit Court of Appeals for the temporary restraining order and temporary injunction sought upon this application. Said restraining order and temporary injunction were denied by said United States Circuit Court of Appeals. While the coming down of the mandate from the Circuit Court of Appeals has not yet occurred and has been, upon your petitioner's application, automatically stayed (pursuant to Rule 30 of the United States Circuit Court of Appeals for the Third Circuit), nevertheless the restraining order

prayed for herein is essential to your petitioner. Since the order of said Circuit Court of Appeals reversing the order of the United States District Court for the District of New Jersey was filed, respondent, All Continent Corporation, has taken further proceedings in said Pennsylvania action. On December 1, 1936, respondent procured a temporary restraining order in said Pennsylvania action. On December 11, 1936, respondent procured a permanent injunction in said Pennsylvania action.

Your petitioner has in all respects proceeded diligently to bring before this Court this application, together with his petition for a writ of *certiorari*.

Your petitioner further moves and prays for such other and further relief as may be proper.

And your petitioner will ever pray.

By WM. ELMER BROWN, JR.
Counsel for Petitioner

Dated JAN 11 1937

IN THE

SUPREME COURT OF THE UNITED STATES

HIRAM STEELMAN, Trustee in Bankruptcy of William Fox, a Bankrupt,

Petitioner,

vs.

ALL CONTINENT CORPORATION,

Respondent.

MEMORANDUM IN SUPPORT OF PETITION FOR TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION

The grounds and reasons for the application contained in the annexed petition are set forth in the said petition and in the petition for writ of *certiorari* filed in this court in the above entitled cause this day.

The jurisdiction and power of a Justice of this Court or of the Court itself to grant the relief prayed for cannot be questioned. It is granted by Section 262, Judicial Code (28 U. S. C. A. § 377) which provides:

> "The Supreme Court * * * shall have power to issue all writs not specifically provided for by statute which may be necessary for the exercise

> of their respective jurisdictions and agreeable to the usages and principles of law."

and Section 264, Judicial Code (28 U. S. C. A. § 378) which provides:

> "Writs of injunction may be granted by a Justice of the Supreme Court in cases where they might be granted by the Supreme Court * * * ."

Respectfully submitted,

WM. ELMER BROWN, JR.
Counsel for Petitioner

FILED
MAR 6 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936. No. 638.

HIRAM STEELMAN, Trustee in Bankruptcy of WILLIAM FOX, a Bankrupt,

Petitioner,

vs.

ALL CONTINENT CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF PETITIONER

WM. ELMER BROWN, JR.,
C. BREWSTER RHOADS,
WM. D. WHITNEY,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936. No. 638.

HIRAM STEELMAN, Trustee in Bankruptcy of WILLIAM FOX, a Bankrupt,
Petitioner,

vs.

ALL CONTINENT CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF PETITIONER

OPINIONS OF COURTS BELOW

The opinion of the Circuit Court of Appeals, Third Circuit, appears at R. 101-106, and is officially reported in 86 F. (2d) 913. The opinion of the United States District Court for New Jersey appears at R. 29-31 and is officially reported in 16 F. Supp. 949.

JURISDICTION OF THIS COURT

The final decree of the Circuit Court of Appeals is dated December 1, 1936 (R. 107). Petition for certiorari was brought pursuant to Section 240(a) of the Judicial

Code, as amended by the Act of February 13, 1925 (Act of Cong., Feb. 13, 1925, c. 229, § 1; 43 Stat. 936, 938; 28 U. S. C. § 347) and Section 25 of the Bankruptcy Act of 1898 (Act of Cong., July 1, 1898, c. 541, § 25; 30 Stat. 544, 553; 11 U. S. C. § 48). Certiorari was granted by order of this Court dated February 15, 1937 (R. 149).

STATEMENT OF THE CASE

William Fox was adjudicated a voluntary bankrupt on May 29, 1936, by the United States District Court for New Jersey (hereinafter called "the bankruptcy court"). Petitioner was appointed trustee in bankruptcy and duly qualified as such (R. 3, 9-10, 53, 94).

Respondent, All Continent Corporation, a Delaware corporation maintaining its office and principal place of business at Atlantic City, New Jersey (R. 3, 8, 10, 15, 83), appeared in said bankruptcy proceeding and filed proof of claim for the sum of $417,258.19 as an alleged creditor of William Fox on June 19th, 1936[1] (R. 8, 15). The claim

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[1]This date of filing and the exact amount of the claim appear only from the record lodged with the Clerk of this Court in the *Matter of the Petition of Hiram Steelman, Trustee, etc., for a Writ of Prohibition against and/or a Writ of Mandamus to the Hon. George A. Welsh, District Judge of the United States for the Eastern District of Pennsylvania, and the said Court*, October Term, 1936, Original as yet unnumbered, p. 20. This record is hereinafter referred to as "*Matter of Steelman, R.*". It is well settled, however, that this Court takes judicial notice of matters appearing in its own records. This is especially done where those records relate to the same parties and related litigation.

Craemer v. *Washington State*, 168 U. S. 124, 129;
Washington & Idaho Railroad Co. v. *Cœur d'Alene Railway and Navigation Co.*, 160 U. S. 101, 102-103;
Fritzlen v. *Boatmen's Bank*, 212 U. S. 364, 370-371;

of All Continent Corporation for this same sum was listed as a liability by William Fox in the schedules filed at the time of his petition in bankruptcy (R. 44, 79).

The only assets turned over to the trustee consisted of $100 in cash, and certain notes, claims and securities upon which petitioner has been unable to realize any funds and which after investigation appear to be worthless,[2] although listed at a sum in excess of $1,000,000. Listed liabilities were in excess of $9,000,000 (R. 8-9, 15-16).

Orders were entered directing examination of All Continent, and certain of its officers, directors, accountants and bookkeepers pursuant to § 21(a) of the Bankruptcy Act (Act of Cong. Feb. 5, 1903, c. 487, § 7, 32 Stat. 798; 11 U. S. C. § 44(a)). Such examination was diligently conducted through July and August of 1936 (R. 3, 10, 67). Examination of the bankrupt is still in progress; but examination of All Continent has been effectively blocked by the refusal of its president (who was and is also the wife of the bankrupt) to submit to such examination. She was thereupon cited for contempt by the referee (R. 3, 6, 10, 13).

U. S. v. *California Coöperative Canneries*, 279 U. S. 553, 555-556;
National Fire Insurance Co. v. *Thompson*, 281 U. S. 331, 336-337.

Such notice has not been limited to matters appearing of record in cases previously adjudicated, but has been taken as well of matters appearing in the record of a case pending before this Court.

West Ohio Gas Co. v. *Public Utilities Commission of Ohio* (*No. 1*), 294 U. S. 63, 70-71.

[2]As a matter of fact, the bankrupt had denuded the estate of funds for the very purpose of alimenting his own and All Continent's attorneys, having paid them, at or about the time of filing his petition, $7,500 out of his alleged remaining $7,600 of cash (R. 8, 15, 80).

In the course of the examinations under § 21 (a), the referee found that a thorough examination and audit of the respondent's books was "absolutely necessary to the proper administration of the estate of the bankrupt" (R. 5, 12). This conclusion was based upon the following facts, as summarized by the referee (R. 4-5, 11-12):[5]

> "The All Continent Corporation, whose books and records are here sought to be examined, was the creation of the bankrupt himself; every dollar of its capital came from the bankrupt; by the formation of the corporation, he divested himself of a very substantial portion of his property; all of its capital stock, now allegedly owned by the wife of the bankrupt, has never been transferred upon the books of the corporation, and the bankrupt still appears as the record holder thereof; from the time of the formation of the corporation, the bankrupt retained in his possession and under his control, the securities forming the assets of the corporation; in numerous instances, the bankrupt dealt with the assets of corporation as his own; the bankrupt from the time of the formation of the corporation, had power of attorney to act for it with extremely broad powers; the bankrupt was undoubtedly the guiding spirit in all of the affairs of the corporation throughout its entire corporate existence; the books and records already in evidence disclose that the corporation made disbursements for the account of the bankrupt and various corporations owned by him, and that the major portion of the transactions of the corporation were transactions of this type, or transactions in which the bankrupt or the corporations which he owned, were involved; * * *; this

[5]Categorical sworn statements substantially to the same effect appear in *Matter of Steelman*, R. 4-5.

> chain of facts and circumstances and many others in the record of testimony already adduced, demonstrate clearly that the affairs of the All Continent Corporation were so related to and intertwined with the property and affairs of the bankrupt as to render absolutely necessary to the proper administration of the estate of the bankrupt a complete and thorough examination and audit by the Trustee of the books and records of the All Continent Corporation."

Accordingly, the referee ordered All Continent to make its books available for such examination.[4] Proceedings by All Continent to review said order are now pending (R. 5-6, 12-13).

Hearings in the bankruptcy proceedings upon the issue as to the identity of All Continent and the bankrupt, presented by All Continent's proof of claim and the objections thereto, have been delayed pending completion of the § 21(a) examinations and audit of books of All Continent (R. 5-6, 12-13). These have in turn been delayed by the refusal of the bankrupt's wife (who is also the president of All Continent) (R. 3, 6, 10, 13) and the refusal of Herbert Leitstein, another officer and the bookkeeper of All Continent (who is also the personal secretary and bookkeeper of the bankrupt) to testify therein, for which refusal both the bankrupt's wife and the said bookkeeper have been cited to the bankruptcy court for contempt (R. 6, 13; *Matter of Steelman*, R. 16), and by the refusal to make the books of All Continent available for such examination (R. 5-6, 12-13), which refusal is now subject

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[4]This order was approved by the district court with modifications affecting only the manner of conducting the examination. *In re Fox*, 16 F. Supp. 950.

to review by the Circuit Court of Appeals, Third Circuit (*Matter of Steelman,* R. 17).

At this stage in the bankruptcy proceedings, All Continent, in September, 1936, without first obtaining leave of the bankruptcy court, instituted a suit in the United States District Court for the Eastern District of Pennsylvania (hereinafter called "the Pennsylvania suit") in which it joined petitioner as an absentee defendant pursuant to Section 57 of the Judicial Code (Act of Cong., Mar. 3, 1911, c. 231, § 57, 36 Stat. 1102; 28 U. S. C. § 118) (R. 6-7, 13-14, 26-27, 31; *Matter of Steelman,* R. 17-19). The stated purpose of the Pennsylvania suit was to remove an alleged cloud on title to certain securities placed in the possession of Philadelphia brokers (Sparks & Co.) in the name of All Continent shortly prior to the filing of the petition in bankruptcy (R. 19, 23). The alleged cloud on title consisted of a third-party subpoena issued out of the United States District Court for the Southern District of New York on March 27, 1936, in supplementary proceedings by Capital Company, a judgment-creditor of the bankrupt William Fox[5] (R. 20, 22-23, 24-26). The said third-party subpoena contained an injunction, pursuant to New York statute (Civil Practice Act § 781, Laws of 1935, c. 630), restraining the brokers from transferring any property of William Fox, the judgment-debtor[6] (R. 25-26), and it was alleged that, pursuant thereto, the brokers re-

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[5]The contempt of William Fox in disregarding a similar subpoena in the same supplementary proceedings was recently before this Court. *Fox* v. *Capital Company,* 299 U. S. 105.

[6]The validity of the subpoena was upheld by the Circuit Court of Appeals, for the Second Circuit, in *Capital Co.* v. *Fox,* 85 F. (2d) 97.

fused to transfer the aforesaid securities in their possession in the name of All Continent (R. 22).

On September 9, 1936, the day set for hearing on the review of the referee's order directing All Continent to submit its books for audit (R. 6, 13), petitioner, as trustee, though not a resident of, nor found within, the Eastern District of Pennsylvania (R. 18, 27; *Matter of Steelman*, R. 6), was served in Atlantic City, New Jersey, with a subpoena issued out of the United States District Court for the Eastern District of Pennsylvania, in the Pennsylvania suit (R. 6-7, 13; *Matter of Steelman*, R. 19). On September 18, 1936, petitioner, not having been found within said Eastern District of Pennsylvania and not having voluntarily appeared in said Pennsylvania suit, was served with a copy of an order to plead entered in said proceedings upon motion of All Continent (R. 7, 14, 26-27).

It being apparent, as stated by the district judge in his opinion (R. 30), that the effort by All Continent in the Pennsylvania suit was "to force the trustee to appear and litigate the entire question now before this Court in the bankruptcy proceedings, that is, whether actually the property and assets of [All Continent] Corporation belong to the bankrupt", and that "Such litigation as against [All Continent] Corporation, if ultimately deemed advisable, ought to be conducted by trustee after there has been a full and complete disclosure of the facts in the § 21(a) examinations," petitioner as trustee applied to the bankruptcy court for an injunction restraining All Continent from further prosecuting said action against petitioner (R. 2-28).

Respondent filed no answer to the trustee's petition, but on September 25, 1936, moved in the bankruptcy court to dismiss it on the grounds that the bankruptcy court (1) was without jurisdiction to grant the relief requested; (2)

had no power to grant such relief; and (3) was required by principles of comity not to interfere with the process of the court in the Eastern District of Pennsylvania (R. 28-29). The bankruptcy court, being of the opinion that the trustee was improperly made a defendant in said Pennsylvania suit, and "that the prosecution of said suit against said Trustee would interfere materially with the proper and orderly administration of the affairs of this bankrupt estate" (R. 32), handed down a decree on October 7, 1936, which enjoined and restrained All Continent from further prosecuting said Pennsylvania suit against the trustee (R. 31-32).

Thereafter, on October 13, 1936, the trustee, with the approval of the bankruptcy court, instituted a plenary suit in the Chancery Court of New Jersey against All Continent; William Fox, the bankrupt; Eva Fox, his wife; Mona and Belle Fox, his daughters; and other members of his family; in which the trustee sought to set aside certain conveyances, transactions and transfers between the bankrupt and his wife, between the bankrupt and All Continent, and between the bankrupt and each of his daughters, so that the trustee might become vested with title to the assets which he claimed were properly assets of the bankrupt estate (R. 36-88; *Matter of Steelman*, R. 22). The assets sought in this action included not only the securities involved in the Pennsylvania suit but all of the other assets held in the name of All Continent and the very stock of All Continent registered in the name of the bankrupt but claimed by the bankrupt's wife, Eva Fox (R. 36-55).

On appeal from the restraining order issued by the bankruptcy court against All Continent, the Circuit Court of Appeals, over the trustee's objection, permitted respond-

ent (there appellant) to incorporate into the record the bill of complaint in the New Jersey Chancery suit, the affidavit of the trustee submitted in support of said bill of complaint, the order to show cause issued by the Chancery Court of New Jersey in the trustee's suit restraining All Continent and the other defendants in that action from disposing of the property therein involved, the answer interposed by J. W. Sparks & Co. in the Pennsylvania suit and the notice of motion of Capital Company to quash the writ of subpoena in the Pennsylvania suit (R. 35-100).

The New Jersey Chancery bill of complaint reveals that the trustee seeks to recover all of the property of All Continent, and all of the capital stock of All Continent, as property of the bankrupt estate, on the following grounds: (a) that All Continent has no separate existence or identity and in fact is merely the bankrupt himself doing business under the guise of the corporate form; (b) that the original transfer of assets of a then market value of $7,000,000, and all subsequent transfers from the bankrupt to All Continent were colorable only; (c) that the original transfer of the $7,000,000 and all subsequent transfers from the bankrupt to All Continent were made without consideration and in fraud of creditors of the bankrupt; (d) that the purported transfer from the bankrupt to his wife of all the stock of All Continent was colorable only; and (e) that the said purported transfer from the bankrupt to his wife of all of the stock of All Continent was made in fraud of the creditors of the bankrupt (R. 36-88).

The Circuit Court of Appeals reversed the decree of the bankruptcy court and vacated the restraining order on the ground that the bankruptcy court was without power to enjoin respondent from further prosecuting the Pennsylvania suit against the trustee, for the reason that the

court in the Pennsylvania suit had acquired exclusive jurisdiction by virtue of Section 57 of the Judicial Code. It is this decree of the Circuit Court of Appeals which your petitioner now seeks to have reversed.

In the course of its opinion, the Circuit Court of Appeals undertook to discuss not only the issue before it, but also to review the matter contained in the supplemental record and to express its views by *obiter dicta* upon numerous questions which have arisen or are likely to arise hereafter between respondent and your petitioner with respect to said Chancery Court suit and other proceedings. This phase of the case is discussed more in detail later in this brief, and said *dicta* are there specifically set forth (see pp. 51-64, *infra*).

By these *dicta* the Circuit Court of Appeals has prematurely expressed its opinion (1) that the subpoena of the New York court is a "cloud on title"; (2) that the Pennsylvania court is the only court that can remove such "cloud"; (3) that the controversy between All Continent and the trustee is the same in the Pennsylvania suit as in the New Jersey Chancery suit; (4) that the New Jersey Chancery suit sets forth two "separable controversies"; (5) that the trustee must prove all of the averments of his New Jersey Chancery bill which relate to All Continent, in order to establish his ownership of the comparatively small group of All Continent's assets involved in the Pennsylvania suit; (6) that the trustee cannot establish his right to that part of the assets of All Continent involved in the Pennsylvania suit without establishing his right to all of the assets of All Continent; (7) that the decision to be entered by the Pennsylvania court in the suit there instituted by All Continent will be binding upon the trustee "in every other court in which that question might be litigated between the parties";

(8) that the Pennsylvania court is entitled to exclusive jurisdiction over the controversy between the trustee and All Continent; (9) that maintenance of this exclusive jurisdiction justifies the issuance of an injunction to "restrain the trustee from litigating the controversy elsewhere"; (10) that Capital Company is seeking the securities involved in the Pennsylvania action for itself; and (11) that it is the official duty of the trustee voluntarily to appear in the Pennsylvania court and there defend the suit brought by All Continent.

None of these matters was necessarily involved in the issue presented on the appeal and none, therefore, was argued by the Trustee, whose rights were thus adversely prejudged by the Circuit Court of Appeals.

QUESTIONS PRESENTED

The question presented by the *decision* of the Circuit Court of Appeals is whether a court of bankruptcy has *power* to enjoin a creditor (in this case a corporation all of the stock of which is owned either by the bankrupt or by his wife) from prosecuting, as against the trustee, a suit under § 57 of the Judicial Code (Act of Cong., Mar. 3, 1911, c. 231, § 57, 36 Stat. 1102; 28 U. S. C. § 118) brought subsequent to the adjudication, in a foreign jurisdiction, where the bankruptcy court properly determines that prosecution of said suit against the trustee would constitute an interference with the orderly administration of the bankrupt estate.

The question presented by the prejudicial *dicta* of the Circuit Court of Appeals is whether it is a proper function of an appellate court to express its opinion upon numerous questions not presented by the record before it, not argued

or briefed by counsel in the case before it, and which may in the ordinary course of litigation never come before it, in effect prejudging and thereby prejudicing the parties to the litigation in securing a fair hearing upon such questions when properly presented in the lower courts.

SPECIFICATION OF ERRORS AND SUMMARY OF ARGUMENT

Petitioner relies on each of the three errors assigned in the petition for certiorari. The following summarizes his argument in support thereof:

I.

THE BANKRUPTCY COURT HAD *Power* TO GRANT THE INJUNCTION.

The general powers of the bankruptcy court are broad enough to protect every right and to prevent any wrong connected with the bankrupt estate and its administration, GILBERT'S COLLIER ON BANKRUPTCY (4th Ed. 1937), page 73. The power to issue an injunction, when necessary to prevent the defeat or impairment of the jurisdiction of the bankruptcy court, is inherent in such court as a duly established court of equity, *Continental-Illinois Bank* v. *Chicago, etc. Ry. Co.*, 294 U. S. 648.

While examinations were being conducted under § 21(a) of the Bankruptcy Act to determine (among other things) whether there was a defense to the claim filed by All Continent, and whether the assets of All Continent could be recovered for the estate on the ground that that corporation was (a) a mere dummy or *alter ego*, or (b) a fraudulent transferee of the bankrupt, All Continent insti-

tuted a *quasi in rem* proceeding in Pennsylvania. This suit was designed and calculated to provide a conclusive determination of the issues under investigation in the bankruptcy court before that investigation could be completed. As it was an interference with the orderly administration of the bankruptcy court, the latter had power to enjoin it. *Cf. Local Loan Co.* v. *Hunt*, 292 U. S. 234.

II.

THE BANKRUPTCY COURT PROPERLY EXERCISED ITS DISCRETION.

This is true, whether the case be determined simply on the record presented to the bankruptcy court, or by the aid of the further facts shown in the supplemental record admitted on motion of All Continent in the Circuit Court of Appeals, or in the petition for prohibition or mandamus pending in this Court in *Matter of Steelman*.

All Continent had filed a substantial claim in the bankruptcy proceedings, thereby submitting itself to the bankruptcy jurisdiction and constraining the trustee to prepare defenses to the claim. Such defenses would include evidence that All Continent was but the *alter ego* of the bankrupt, that All Continent had no assets separate from those of the bankrupt, and that, if it had such assets, they had been fraudulently transferred to it by the bankrupt. All of these defenses had already been *prima facie* established as the result of the § 21(a) examination, and the referee had so reported. At that point, the § 21(a) examination of All Continent was interrupted by the refusal of its president (who was also the wife of the bankrupt) to testify and turn over the books of the corporation for audit by the trustee.

Moreover, the bankrupt's scheduled liquid assets ($100) were utterly insufficient to permit the trustee adequately and properly to defend the Pennsylvania suit. In effect, the entire conduct of the bankrupt, of his wife, and of All Continent is indicative of a continuing conspiracy between them to impede and to obstruct the bankruptcy court and to harass and defraud the creditors of the bankrupt.

The Pennsylvania action involved only a part of the assets, and only a few of the issues involved both in the trustee's resistance to the proof of claim in the bankruptcy court, which first had jurisdiction, and in the subsequent plenary proceeding instituted by the trustee in the Chancery Court of New Jersey.

Indeed, although the proposition be unnecessary to the decision of this case, it may well be that the filing of the claim by All Continent, in the circumstances of this case, confers upon the bankruptcy court an exclusive jurisdiction over the controversy presented in the Pennsylvania suit.

III.

The Prejudicial *Dicta* of the Circuit Court of Appeals Require the Exercise of This Court's Power of Supervision.

The opinion of the Circuit Court of Appeals contained eleven *dicta*, outlined in the Statement, *supra*, pp. 10-11. Ordinarily, the inclusion of *dicta* in an opinion below does not call for review by this Court. But the number of these *dicta* is so great and their effect upon the entire future course of the bankruptcy proceeding so substantial, as to render the present case one in which this Court may well be called upon to exercise its power to correct extreme de-

partures by the courts below from the accepted and usual course of judicial proceedings.

The attempt by the Circuit Court of Appeals to determine prematurely, without benefit of argument, that the Pennsylvania court has exclusive jurisdiction of the entire controversy between All Continent and the trustee, and therefore has power to enjoin the conduct of the plenary suit instituted by the trustee in the New Jersey Chancery Court, is particularly prejudicial.

Other *dicta* of less moment include a plain statement that the plenary suit instituted by the trustee is removable to a Federal court (a question over which the Circuit Court of Appeals has no power even of appellate review); a statement that the Pennsylvania court is the only court empowered to remove the alleged "cloud" on the title of All Continent to the securities in Pennsylvania (thereby ignoring the power of the United States District Court for the Southern District of New York, which itself created the alleged "cloud," to remove the same); a statement that it would be a *breach of duty* on the part of the trustee not to appear in the Pennsylvania court (quite apart from the fact that the bankrupt left to the trustee only $100 in cash with which to administer the entire estate, and that the machinery for an economical determination of all issues, including those involved in Pennsylvania, had already been set in motion in the bankruptcy court); and other erroneous statements.

All of the *dicta* are particularly prejudicial, as the Circuit Court of Appeals acts as the reviewing court from the three different courts in which various proceedings must be had in the future (the bankruptcy court, the United States District Court for the Eastern District of Pennsyl-

vania, and the United States District Court for the District of New Jersey, sitting in equity pursuant to the removal thereto of the plenary proceeding). All of these courts are thereby instructed in advance as to the opinion of the Circuit Court of Appeals on many points not yet presented or argued there, but which may be determinative in the future of the issues between All Continent and the trustee.

The obvious propriety of denying to the bankrupt, his wife, and All Continent (the conduct of all of whom in the bankruptcy proceedings has been contemptuous and obstructive) benefit from these erroneous and premature pronouncements of the court below, appears peculiarly to justify supervisory review by this Court in this case, expressly revising and rejecting the *dicta* below.

POINT I

THE BANKRUPTCY COURT HAD POWER BY INJUNCTION TO RESTRAIN INTERFERENCE WITH THE EXERCISE OF ITS JURISDICTION IN ADMINISTERING THE BANKRUPT ESTATE.

The decision of the Circuit Court of Appeals, here under review, reversed the decision of the bankruptcy court granting an injunction, *solely* on the ground of want of power. The opinion concludes (R. 106):

> "Under the facts in this case, the District Court of New Jersey did not have power to restrain the suit which the statute clearly authorized to be brought in the Pennsylvania court."

This was appropriate to the Court's opening statement of the question at issue (R. 104):

> "The real question in issue here is whether or not the New Jersey Court had the power to enjoin the appellant from prosecuting its suit, under the facts of this case, in the Pennsylvania Court."

And respondent's counsel in their brief in opposition to the petition for certiorari herein (p. 4) agreed that the question was one of "power" and that the Circuit Court of Appeals had decided that "the District Court was without power to enjoin the Pennsylvania suit."

Speaking generally, GILBERT'S COLLIER ON BANKRUPTCY (4th Ed., 1937) p. 73, says:

> "The power to enjoin is exercised under a wide variety of circumstances, which cannot readily be classified. This necessarily follows from the fact that the power is broad enough to protect every right and prevent every wrong connected with the bankrupt estate and its administration."

This power is derived partly from the inherent powers of a court of equity, with which bankruptcy courts are vested, and partly from the omnibus authorization of § 2 (15) of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, § 2, 30 Stat. 545; 11 U. S. C. § 11):

> "The courts of bankruptcy as defined in the previous chapter" * * * are invested, within their respective territorial limits * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * *, to * * *
>
> "(15) make such orders, issue such process, and enter such judgments in addition to those specifically

provided for as may be necessary for the enforcement of the provisions of this title; * * *"

Among the powers specifically granted to bankruptcy courts by other subdivisions of this same section, the exercise of which may be protected by injunction issued pursuant to Subdivision 15, are the powers to:

"* * * (2) allow claims, disallow claims, reconsider allowed or disallowed claims, and allow or disallow them against bankrupt estates;

"* * * (6) bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for the complete determination of a matter in controversy;

"* * * (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;

"* * * (10) consider and confirm, modify or overrule, or return, with instructions for further proceedings, records and findings certified to them by referees; * * *"

This Court has recently considered the injunctive power of bankruptcy courts in *Continental Illinois National Bank & Trust Company* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648, which involved the reorganization of an insolvent railroad debtor under § 77 of the Bankruptcy Act as amended in 1933 (Act of Cong., Mar. 3, 1933, c. 204, § 1, 47 Stat. 1474, 11 U. S. C. § 205). The bankruptcy court had enjoined the sale of collateral held by the payees of various short term notes of the debtor railroad where it appeared "that the value of the collateral securing each of

the outstanding notes is substantially in excess of the loan thereby secured;" and "that if holders of the notes should sell the collateral it would cause a substantial and irreparable loss to the trust estate" (294 U. S. at p. 657). This Court unanimously affirmed the injunction decree of the bankruptcy court, upholding by broad language the "power" of a court of bankruptcy to act by injunction when facts are presented which call for the exercise of such power. Although this Court was there dealing with a reorganization under § 77, and not with an individual bankruptcy, and although this Court carefully refrained from expressing any opinion as to the propriety of an injunction in an "ordinary bankruptcy proceeding" in the circumstances there presented, the opinion made it clear that no distinction, practical or even theoretical, could be made between bankruptcies on the one hand, and insolvencies such as form the basis for petitions under § 77 on the other (pp. 668-675). It was pointed out (at p. 668) that:

> "From the beginning, the tendency of legislation and of judicial interpretation has been uniformly in the direction of progressive liberalization in respect of the operation of the bankruptcy power."

The following extracts from the opinion,—the last word of this Court on the subject—are, therefore, instructive:

> "By § 2 of the Bankruptcy Act (U. S. C. Title 11, § 11), courts of bankruptcy are invested 'with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings.' They are essentially courts of equity, and their proceedings inherently proceedings in equity, the words 'at law' probably having been inserted

> only with regard to clause (4) of § 2, which confers authority to arraign, try, and punish bankrupts and others for violations of the act. *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 240. Their adjudications and orders constitute in all essential particulars decrees in equity. *Idem.* 241. The power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is, therefore, inherent in a court of bankruptcy, as it is in a duly established court of equity. Section 262 of the Judicial Code, which authorizes the United States courts 'to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions' recognizes and declares the principle."
>
> * * * * * *
>
> "The bankruptcy court, in granting the injunction, was well within its power, either as a virtual court of equity, or under the broad provisions of § 2 (15) of the Bankruptcy Act or of § 262 of the Judicial Code" (p. 676).

The Court further made it clear not only that the bankruptcy court had "power" to issue the injunction, but that the manner of exercising its discretion was not reviewable on appeal unless abuse of discretion appeared:

> "A claim that injurious consequences will result to the pledgee or the mortgagee may not, of course, be disregarded by the district court; but it presents a question addressed not to the power of the court but to its discretion—a matter not subject to the interference of an appellate court unless such discretion be improvidently exercised" (p. 677).

The lower courts have frequently exercised their injunctive power to restrain the sale, removal or other disposi-

tion of property in the possession of adverse claimants, however substantial the adverse claim, where it has been made to appear that the trustee or receiver in bankruptcy either has asserted or is about to assert a bona fide claim to recover such property for the bankruptcy estate on the ground of a prior fraudulent transfer or some other ground.

In re Currier, 5 A. B. R. 639 (W. D. N. Y., 1901, Hotchkiss, Referee);
Beach v. *Macon Grocery Co.,* 116 Fed. 143 (C. C. A. 5th, 1902);
In re Mitchell, 278 Fed. 707 (C. C. A. 2d, 1922);
In re Mills, 179 Fed. 409 (E. D. N. Y. 1910);
In re Miller, 118 Fed. 360 (E. D. Ga. S. D. 1901);
In re Norris, 177 Fed. 598, (W. D. N. Y. 1910).

The last-named case expressly states the rule which seems necessarily to follow from the language of this Court in such cases as *Harrison* v. *Chamberlin,* 271 U. S. 191. In establishing the test to govern trustees in determining whether to bring plenary proceedings, this Court there directed that plenary proceedings should be brought where the adverse claim was "substantial" and not "merely colorable" and said that:

> "it is not to be held merely colorable unless the preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color of merit, and a mere pretense" (271 U. S. at p. 195).

It follows that the trustee must make a "preliminary inquiry" in order to ascertain of which character the adverse claim is. The making of this inquiry must be protected, if necessary, by injunction against precipitate action by the adverse claimant designed to forestall or defeat the inquiry. Thus, it was said in the *Norris* case, 177 Fed. 598, that:

> "The court has power to ascertain, if an adverse claim be made by a third person in possession of the property, whether such claim is in fact well-founded, or if it is fictitious or colorable".

This was precisely what was done in the present case, as § 21(a) examinations were diligently pressed, until obstructed by All Continent itself and its officers (including particularly the wife of the bankrupt). Before the bankruptcy court could complete its inquiry as to whether the adverse claim of All Continent was "in fact well-founded", or (if not necessarily well-founded) was at least so "substantial" as to require plenary proceedings, or finally, was "merely colorable", the Pennsylvania suit was commenced. This is certainly an appropriate situation for the exercise by a bankruptcy court of its power to enjoin the prosecution of a foreign suit.

This Court has laid down the principle in broad terms that the injunctive power of the bankruptcy court includes jurisdiction to restrain the prosecution by creditors or adverse claimants of litigation in state courts, or other courts outside the bankruptcy court, when it is made to appear that such litigation either will interfere with the administration of the bankruptcy proceedings in the bankruptcy court or will substantially and practically frustrate the purpose of the bankruptcy proceedings. *Local Loan Co.* v.

Hunt, 292 U. S. 234. In that case a bankrupt who had given an assignment of future wages as security for a loan negotiated prior to bankruptcy, had been subsequently discharged in the bankruptcy proceedings from all provable debts and claims. Immediately after entry of the order of discharge, his creditor, who held the wage assignment, instituted an action against the bankrupt's employer in an Illinois state court to enforce the assignment with respect to wages earned after the discharge. It appeared that the Illinois Supreme Court had declared such assignments valid as to future wages in a case which would constitute a binding precedent for the lower Illinois state courts. This Court affirmed an order of the bankruptcy court granting an injunction restraining the holder of the assignment from prosecuting his action in the state court, on the ground that the Illinois rule upholding the validity of such assignments was inconsistent with the purpose of the Bankruptcy Act, and that even though the bankrupt might properly intervene in the Illinois state court action and there assert the invalidity of such assignment as a defense in the action in the state court, resort by the bankrupt to that method of protecting his rights would require him

> "to pursue an obviously long and expensive course of litigation, beginning with an intervention in a municipal court and followed by successive appeals through the state intermediate and ultimate courts of appeal, before reaching a court whose judgment upon the merits of the question had not been predetermined * * *" (p. 241).

This Court observed that the amount in suit was small and concluded that the remedy by intervention and defense in the state court was

> "entirely inadequate because of the wholly disproportionate trouble, embarrassment, expense, and possible loss of employment which it involves." (p. 242).

In line with the policy indicated by this Court's decision in *Local Loan Co.* v. *Hunt,* we find that the lower courts have often enjoined collateral litigation of bankruptcy controversies outside of the bankruptcy courts, and under a variety of different circumstances:

In re Trayna & Cohn, 195 Fed. 486 (C. C. A. 2d, 1912), in which a bankruptcy court enjoined a state court action for conversion brought against the receiver after plaintiff in the state court had already made an application to the bankruptcy court for payment out of the fund allegedly converted and had defaulted on the hearing.

In re Perl, 28 F. (2d) 1002 (W. D. Pa., 1928), in which the bankruptcy court enjoined a judgment creditor of the bankrupt from collecting his judgment, rendered prior to bankruptcy, from a fund on deposit in the state court, until the question could be determined in the bankruptcy proceedings whether the judgment, rendered on confession, constituted a preference.

In re Hornstein, 122 Fed. 266 (N. D. N. Y., 1903), in which the bankruptcy court enjoined a sheriff who held property by virtue of an attachment in an action involving a chattel mortgage from arguing an appeal from the judgment in favor of the attachment creditor in the state court pending the appointment of a trustee and the lapse of sufficient time to enable such trustee to proceed in the bankruptcy court to recover either the mortgaged property or its value.

In re Nathan Turim, Inc., 55 F. (2d) 672 (S. D. N. Y., 1931), in which the court stated that it had jurisdiction in aid of bankruptcy proceedings to enjoin adverse claimants from suing the bankrupt's debtor in the state court upon the bankrupt's assignment, although it held in the particular circumstances that it was not justified in ordering the payment of the debt claimed by the bankrupt's estate into court pending the outcome of a plenary suit.

In re Republic Plumbing Supply Corporation, 295 Fed. 573 (E. D. N. Y., 1924), in which the court denied the trustee's application for an injunction restraining an adverse claimant to whom the bankrupt had transferred promissory notes from prosecuting an action on such notes in the state court, but conditioned such denial on the transferee consenting to deposit in the bankruptcy court the proceeds of his action and stipulating that no determination by the state court should be *res judicata* in the actions contemplated but not yet instituted by the Trustee to set aside the transfers.

The rationale of all of these cases is that the bankruptcy court by virtue of its inherent equity jurisdiction, and the jurisdiction granted to it by § 2 of the Bankruptcy Act, is vested with power to prevent any party to the bankruptcy proceedings, whether creditor, member of the bankrupt's family, adverse claimant, or otherwise, from interfering either with the orderly administration of the bankrupt estate or with the accomplishment of the purposes of the Bankruptcy Act, and that this power may be exercised in the discretion of the bankruptcy court through the medium of an injunction such as that issued in this case.

POINT II

THE BANKRUPTCY COURT IN THIS CASE PROPERLY EXERCISED ITS POWER TO RESTRAIN INTERFERENCE.

Facts justifying the exercise of its injunctive power by the bankruptcy court in this case will be found (1) in the trustee's petition which was before the District Court when the order was granted (R. 2-28), (2) in the so-called "Supplemental Record", which was printed by permission of, and considered by, the Circuit Court of Appeals on motion of All Continent, in addition to the matter which had been before the bankruptcy court (R. 35-100), and (3) in the record in *Matter of Steelman* in this Court.[7]

A. The facts before the bankruptcy court in the trustee's petition justified the exercise of its injunctive power.

The facts in the petition which was before the bankruptcy court (which must be deemed to have been admitted by respondent's motion to dismiss the petition) are as follows:

(a) All Continent filed a claim in the bankruptcy proceedings for moneys claimed to be due to it from the bankrupt (R. 8, 15);

(b) Examinations under Section 21(a) of the Bankruptcy Act of the bankrupt and of the officers of All Con-

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[7]The trustee's petition in *Matter of Steelman* was accompanied by a petition for a temporary restraining order and a temporary injunction. To this All Continent has filed a reply in this Court, but has not therein called in question the truth of any of the facts alleged by the trustee in his petition. Indeed they could not well be questioned, for all are taken directly or by compelling inference from Court records.

tinent had been seasonably commenced and had been diligently prosecuted by the trustee and the creditors (R. 3-10);

(c) The facts already developed in the § 21(a) examinations indicated a strong probability that All Continent is merely the *alter ego* of William Fox (R. 4-5, 7-8, 11-12, 14-15);

(d) Upon the facts developed in the § 21(a) examinations, the referee had directed the production of All Continent's books for audit along with those of the bankrupt (R. 4-5, 11-12);

(e) In directing the production of All Continent's books, the referee had filed a report in which he found that such facts had already been developed as to justify the conclusions, among others, that:

> "from the time of the formation of the corporation, the bankrupt retained in his possession and under his control, the securities forming the assets of the corporation; in numerous instances, the bankrupt dealt with the assets of the corporation as his own; * * * the bankrupt was undoubtedly the guiding spirit in all affairs of the corporation throughout its entire corporate existence; * * *" (R. 4, 11);

(f) Diligent prosecution of the § 21(a) examinations of All Continent had been interrupted by the refusal of the president of All Continent, who was and is also the wife of the bankrupt,[8] to submit to examination concerning All

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[8] § 21(a) of the Bankruptcy Act expressly provides for examination of a bankrupt's wife, as follows:

> "A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act. * * *"

Continent's affairs, for which she was cited for contempt by the referee (R. 6, 13);

(g) The bankrupt's schedules showed only $100 in cash, and accordingly the liquid assets of the estate were utterly insufficient to permit the Trustee adequately and properly to defend the Pennsylvania suit (R. 8-9, 15-16).

1. *The trustee was diligently proceeding in his investigation of the facts which would be determinative of any controversy between All Continent and himself. The bankruptcy court, therefore, rightly exercised its power to enjoin the premature determination of that controversy in a suit by All Continent in another jurisdiction.*

The authorities discussed in Point I, *supra*, pages 16 to 25, established the bankruptcy court's *power* to enjoin the determination of issues raised by adverse claimants for a reasonable time to allow the trustee to present such issues for determination by the bankruptcy court. The exercise of this power is particularly appropriate where, as here, the trustee is proceeding with due diligence toward the presentation of those issues to the bankruptcy court.

The examination of witnesses under § 21(a) commenced eleven days after the appointment of the trustee, and continued almost daily for the next two months (R. 3, 10). In so far as information concerning the true nature of the relationship between All Continent and the bankrupt was concerned, the trustee was prevented from obtaining such information solely by the acts of All Continent itself. Not only did All Continent refuse to comply with the order of the referee to submit its books for examination and audit, but its president, Eva Fox, the wife of the bank-

rupt, refused to submit to any examination concerning its affairs (R. 6-13).[9]

In spite of this, All Continent complained in the Pennsylvania court that irreparable damage would result if it were required to await action by the trustee (R. 23). Yet even the Pennsylvania suit involves only a small fraction of its assets (certain shares of stock placed with a broker in Philadelphia).

In plain effect, All Continent took advantage of the fact that a small fraction of its assets were located in Philadelphia, in its endeavor to head off the trustee by getting a conclusive determination in a foreign *in rem* proceeding before he could fully ascertain the facts in the bankruptcy proceedings, and before he could institute a comprehensive plenary action involving *all* the assets.

The scheme of All Continent is palpable. With one arm, its president holds off the bankruptcy court by going into contempt,—refusing to testify and refusing to produce its books—while with the other its attorneys rush forward a *quasi in rem* proceeding in a foreign jurisdiction of their own choice.[10]

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[9]The trustee included in his sworn petition the statement that, by its institution of the Pennsylvania suit, All Continent was "endeavoring to hinder, impede, harass, obstruct and prevent the orderly, proper and legal administration of the affairs of this bankrupt estate, * * *" particularly his efforts and activities "looking toward the discovery and acquisition of assets in said estate, * * *" (R. 8, 14-15).

[10]Indeed, change of Federal jurisdictions is the established technique of the Fox family to harass and delay creditors. Fox left his two New York homes and established himself at the Claridge Hotel in Atlantic City in order to defeat the jurisdiction of the Southern District of New York and the Second Circuit (*Fox* v. *Capital Co.*, 299 U. S. 105). He then filed in bankruptcy in New Jersey with only $100

The power of the bankruptcy court to protect the orderly administration of bankrupt estates is hollow indeed if in this, or in any other case, it cannot enjoin such proceedings. Personal property such as here involved may easily be taken secretly into different jurisdictions by a fraudulent transferee who may in fact be merely the bankrupt himself doing business in the corporate form. An action or actions may then be brought by such transferee in a foreign jurisdiction or jurisdictions to destroy claims of the trustee as constituting clouds on title. If the power to enjoin be non-existent, this provides a simple method to harass the trustee and to compel him to interrupt his diligent administration of the estate. He may thus be forced to litigate, at great and perhaps prohibitive expense to the estate and creditors, and at the convenience of the transferee, the issue of ownership in a jurisdiction chosen by the transferee and perhaps far removed from the bankruptcy court, at a time when the trustee may not have had an opportunity adequately to educate himself or prepare his defense. Certainly the bankruptcy court is not powerless to prevent such abuses.

2. *The bankruptcy court, by receipt of All Continent's proof of claim, had acquired jurisdiction over all phases of the controversy between All Continent and the trustee, and properly exercised its discretion to enjoin interference with that jurisdiction.*

The controversy between the trustee and All Continent as to the identity between All Continent and the bankrupt

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of scheduled cash assets. But when the trustee and referee there had disappointed him by pressing too hotly on the trail of All Continent, his wife stopped the proceedings by going into contempt, and caused the corporation of which she was president to attempt to shift the venue to Pennsylvania.

was presented to the bankruptcy court by (a) the filing of a proof of claim by All Continent, and (b) the conduct of examinations under § 21(a), which resulted in a referee's order directing production of All Continent's books for audit along with those of the bankrupt, and a referee's report which strongly indicated the validity of the trustee's contention that All Continent is simply the *alter ego* of the bankrupt. This is the identical controversy presented by the subsequent Pennsylvania suit, for the purpose of that suit is to set aside the injunction obtained by the creditor Capital Company in New York, which injunction covered only the "property of William Fox" and, in determining whether that injunction constituted a "cloud" on the title of the Philadelphia securities, the question would be whether they were the "property of William Fox" or the property of All Continent.

If the combination of these admitted facts cannot suffice to confer upon a bankruptcy court the power within its discretion to issue an injunction of the present character, then it must be because a bankruptcy court can never issue an injunction other than in protection of a specific property *res* in its possession. If a bankruptcy court can ever issue an injunction to protect its orderly administration of bankruptcy proceedings, then it is impossible to conceive a case in which the injunction would be more justified.

We know of no case in this Court directly in point, but we submit that on principle the doctrines (a) of *Myers* v. *International Trust Co.*, 263 U. S. 64 (a decision that a bankruptcy determination of fact is conclusive elsewhere as to the same issue of fact), (b) of the numerous cases that recognize and enforce the statutory provisions that courts of bankruptcy are vested with equitable jurisdiction, for example, *Local Loan Co.* v. *Hunt*, 292 U. S. 234 and *Whitney*

v. *Wenman*, 198 U. S. 539, (c) of *Bronx Brass Foundry, Inc.*, v. *Irving Trust Co.*, 297 U. S. 230 (that a bankruptcy court has power to refuse to permit the withdrawal of a claim to the same extent as an equity court may protect jurisdiction it has acquired over a controversy), (d) of *Alexander* v. *Hillman*, 296 U. S. 222 (that filing of a proof of claim in an equity receivership constitutes a submission to the court for the purpose even of a counterclaim assertable by the receiver against a creditor), (e) of numerous decisions that recognize and enforce the broad remedial functions of § 21(a), and finally (f) of *Continental Illinois Bank* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648 (that sale of collateral by an obligee may be enjoined, at least in proceedings under § 77 of the Bankruptcy Act, pending disposition of issues relating thereto in the bankruptcy court), compel the conclusion that jurisdiction once acquired over a controversy may be protected by the bankruptcy court through the use of its injunctive power.

There can be no doubt that All Continent conferred upon the bankruptcy court jurisdiction of the controversy as to identity between itself and the bankrupt. It did this by the very filing of its claim. The first and most obvious defense to such claim is and must be that All Continent cannot file any claim, for it is but the *alter ego* of the bankrupt himself. Unlike the situation in *Whitney* v. *Wenman*, 198 U. S. 539, it was unnecessary for the trustee to take affirmative action to raise that issue, even in the bankruptcy court. The affirmative step was already taken by All Continent in the very act of filing the claim. *Edward Finch Co.* v. *Robie*, 12 F. (2d) 360 (C. C. A. 8th, 1926); 4 *Remington on Bankruptcy* (4th ed., 1935) § 1538. The trustee had but to contest it as soon as it came on for hearing. And of

that contest the bankruptcy court has undoubted jurisdiction. To say that, merely because the contest has not yet been had, the bankruptcy court was powerless to prevent the taking of that contest out to another jurisdiction chosen by All Continent for the purpose, is to make a mockery of the power of the bankruptcy court.

It is well settled that determination of the issue of identity by the bankruptcy court will be binding, in so far as the same issue is presented in future litigation, upon all parties to the issue, including the claimant, All Continent; the creditors, including Capital Company; and the trustee—all the parties to the Pennsylvania suit except Sparks & Co., which is a mere custodian of the securities involved in the Pennsylvania suit. *Myers* v. *International Trust Co.*, 263 U. S. 64.

In the *Myers* case a creditor had objected to approval of a composition of the bankrupt on the ground that he had obtained credit upon the basis of a materially false statement. The bankruptcy court having found adversely to the objecting creditor, and having approved the composition, its determination was held conclusive against the creditor in a subsequent suit at law instituted by the creditor against the bankrupt for damages caused by the same alleged deceit. This Court reversed a decision of the Massachusetts Supreme Judicial Court in favor of the creditor because of an error of the trial court in excluding from evidence the record of the bankruptcy judgment on the composition.

Even if the adverse claim of All Continent be not merely colorable, and be of sufficient substance to require a plenary suit to compel the turning over of the property to the trustee, nevertheless the prior adjudication of the primary question, viz. the identity of William Fox and All Continent, made

by the bankruptcy court in passing upon the objections to the claim of All Continent, will be held binding and conclusive in such plenary suit. Cf. *Head* v. *Brainard*, 5 F. (2d) 289 (C. C. A. 9th, 1925), in which a plenary suit was held necessary to determine the *value* of the converted property of the bankrupt, although the adjudication before a special master in ancillary bankruptcy proceedings of the main question of title and conversion of the property was held binding.

In *Bronx Brass Foundry, Inc.* v. *Irving Trust Co.*, 297 U. S. 230, a claim was filed in a bankruptcy proceeding, to which objection was made by the trustee on the ground that the creditor had received a preference. After some hearings had been held on this issue, but before any determination thereon by the bankruptcy court, the creditor sought to withdraw his claim. The bankruptcy court applied an equity rule which gave the court power to refuse to permit a plaintiff to discontinue after issue had been joined, even though no particular hardship would result to the defendant from such a discontinuance, and denied leave to withdraw the claim.[11] That result was affirmed by this Court.

Admittedly in the present case there has been neither a discontinuance by the claimant nor effort to discontinue, on the one hand, nor hearings contesting the claim, on the other hand. The question is presented whether those facts require the Court to distinguish the rules in the *Myers* and *Bronx Brass* cases. Our view is that the distinctions are

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[11]**The rule in the New Jersey Bankruptcy Court is even more explicit. Bankruptcy Rule 21 E provides:**

> **"Proofs of claim may be withdrawn at any time upon written notice to the referee *and his approval.* * * *" [Italics ours.]**

unsubstantial. The spirit of the rule of those cases, which must be applied alike to the present case, is that a claimant will not lightly be permitted to defeat the jurisdiction or disregard the determinations of the bankruptcy court, whose jurisdiction he has himself invoked. We refer, of course, to jurisdiction over such controversies as are necessarily inherent in the presentation of the claim,—such as the controversy here as to whether the claimant itself is more than the shell of a corporate entity, or has in reality any corporate assets as against the bankrupt.

Subsequent to the decision of this Court in the *Bronx Brass* case, the question was submitted to the Circuit Court of Appeals for the Second Circuit whether the fact that hearings had not yet been had upon the objections to the claim provided a distinction from the *Bronx Brass* case, so that the claimant would then have an absolute right to withdraw his claim. A majority of the Court held that the distinction was not one of substance. *In re Steinreich Associates, Inc.*, 83 F. (2d) 740 (C. C. A. 2d, 1936).

However, an effort might be made to distinguish that case itself on the ground that the trustee had there interposed formal objections to the claim. To this there are two answers:

First, on the facts of this case, it must be apparent (even if we do not take notice of the fact in the *Matter of Steelman* record that a creditor had already objected, and of the fact in the Supplemental Record that the trustee thereafter instituted a plenary proceeding in respect of the same issues) that on the face of the referee's order and report the trustee will surely object to the claim, and indeed, would be guilty of a breach of duty if he failed to do so. This was an obvious factor of which the bankruptcy court

could take note when issuing its injunction. Certainly it would have been scrupling over a technicality to distinguish the *Steinreich* case on the ground that the trustee had there filed his formal objections and to refuse an injunction in the present case because the trustee had not yet filed his formal objection.

Second, the *ratio decidendi* of the *Steinreich* case (following the *Bronx Brass* case) is broad enough to ignore such subtle distinctions. The ground of the decision was that where an adverse party has submitted himself to the bankruptcy jurisdiction, and has thereby necessarily submitted his controversy with the trustee, and where the bankruptcy court is diligently pursuing its investigation of the matter (as here by § 21(a) examinations), then the bankruptcy court has the power to protect its jurisdiction. If those decisions are rested on narrower grounds, they have introduced into the law of the subject a necessity of splitting hairs over the precise facts in each case and have not brought the law into harmony with the broad principles considered by this Court to be so desirable and appropriate to bankruptcy jurisdiction, as pointed out in *Local Loan Co.* v. *Hunt*, 292 U. S. 234, and in *Continental Illinois Bank* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648.[12]

Alexander v. *Hillman*, 296 U. S. 222 bears strongly upon this question. This Court there laid down a rule for equity receivership cases which, if applicable to bankruptcy proceedings, would even render a plenary suit by the trustee against All Continent wholly unnecessary. Under that rule, the mere filing of the claim would vest the bankruptcy

[12]Discussed *supra*, pp. 18-20.

court with jurisdiction of all issues between the claimant and the trustee.[13] We may agree that the provisions of § 68 of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541 § 68, 30 Stat. 544, 565, 11 U. S. C. § 108) do not permit the rule to be pressed so far, and that in this respect the bankruptcy court (at least in proceedings other than those under §§ 77 and 77B) lacks some of the powers of a court of equity. Yet it remains true that the decisions indicative of a modern remedial trend in favor of a "freedom as to procedure", must liberally recognize power in courts entrusted with the administration of insolvent estates, at least where the admitted allegations 'make it appear that corporate respondents were so under control of individual respondents [or a bankrupt] as to be merely their [his] tools for carrying out the transactions culminating in the misappropriations alleged' (paraphrased from *Alexander* v. *Hillman*, 296 U. S. at p. 240).

We turn finally to the recent case of *Continental Illinois Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648. This case is not referred to in the opinion of the Circuit Court of Appeals; but it appears to be determinative. Much of the language of this Court in that case[14] failed of its purpose, if the decision here is to stand. We will not again review that language in detail. Suffice it to say that, if the controversy in this case had not been submitted to the bankruptcy court through the filing of the claim therein by the adverse party and by the course of the

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[13]As held by the Circuit Court of Appeals for the 2nd Circuit in *In re Trayna & Cohen*, 195 Fed. 486, 487:

> "There is no hardship in holding the petitioner to the jurisdiction first invoked by him."

[14]See *supra*, pp. 18-20 for detailed discussion.

§ 21(a) examinations, then much of the liberal and constructive language of this Court's opinion in the *Continental Bank* case was too broad, if not definitely misleading.

What ultimate and practical value was it to creditors for this Court to approve "the fundamental and radically progressive nature" of the "extensions" of the bankruptcy power, "all * * * judicially approved or accepted as falling within the power conferred by the bankruptcy clause of the Constitution" (294 U. S. at p. 671), which "have constituted extensions into a field whose boundaries may not yet be fully revealed" (*idem*), and representing as they do steps "in the direction of liberalizing the law on the subject of bankruptcies" (*idem*), if the bankruptcy court still lacks the power here asserted? Would it not be strange if the general language of § 2, which broadly invests the bankruptcy courts "with such jurisdiction at law or in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings", were properly construed to embrace injunctions against sale of collateral (294 U. S. at p. 675), and yet not to suffice for injunctions against suits having an even more radical effect,—the effect of securing to others property, not (as in those cases) in respect of which the adverse claimant has admittedly a lien, mortgage or other superior interest, but in respect of which examination under § 21(a) has disclosed that the adverse claimant very likely has no interest at all? Can it then any longer be said of such powerless courts that "their adjudications and orders constitute in all particulars decrees in equity" (294 U. S. at p. 675)? Should it not rather be held that the principle is decisive that "the power to issue an injunction when necessary to prevent

the defeat or impairment of its jurisdiction is, therefore, inherent in a court of bankruptcy, as it is in a duly established court of equity" (294 U. S. at p. 675)?

3. To avoid a multiplicity of suits and to restrain the bankrupt's attempts, through his alter ego, All Continent, to frustrate an orderly determination in the bankruptcy court of the issues on which that court's decision will be conclusive, an injunction was necessary.

The bankruptcy court had before it the fact that the trustee and creditors had been diligently conducting § 21(a) examinations of various witnesses, including the officers and employees of All Continent (R. 3, 10). It further knew that Eva Fox, president of All Continent and the wife of the bankrupt, had refused to testify and had been cited for contempt (R. 6, 13). It had before it the referee's report indicating that, in so far as the trustee had been able to ascertain, in spite of All Continent's obstructive tactics, there was a strong probability that All Continent was merely a sham created by the bankrupt for the purpose of defeating the rights of his creditors (R. 4-5, 11-12).

The conduct of § 21(a) examinations is a vital part of the orderly administration of any bankrupt estate. The function of such examinations is frustrated unless the trustee's examination be thorough and searching and this, of course, takes time. The trustee starts in ignorance and must learn. If an adverse claimant under examination were free to nullify the effect of the procedure set up by the Bankruptcy Act for education of the trustee as to the facts, by commencing proceedings in another jurisdiction by which the question under examination could be finally

disposed of and the trustee be bound, the purpose and effectiveness of such examinations would be gravely imperilled, if not defeated entirely. Yet that is the theory of the Circuit Court of Appeals in the present case, holding as it does that it is the duty of the trustee to come into the Pennsylvania Court proceedings and there to litigate the entire question under examination in § 21(a), and that the trustee will be bound in all jurisdictions by the decision in Pennsylvania. A notable statement of the principle was that first made by Chief Judge Shaw for the Supreme Judicial Court of Massachussetts in *Harlow* v. *Tufts*, 4 Cush. 448, 453 (1849) and adopted by District Judge Lowell[15] in *In re Krueger*, Fed. Cas. No. 7942 (D. C. Mass. 1872) whence it found its way into *In re Fixen*, 96 Fed. 748, 755 (D. C. S. D. Cal., 1899) and was from there taken up and repeated by the Circuit Court of Appeals for the Second Circuit last year in *In re Paramount Publix Corp.*, 82 F. (2d) 230, 233:

> "The purpose of the statute seems to be, by a thorough investigation of the case, and an appeal to the conscience of the party suspected, to enable the assignees to judge whether they will proceed to claim such property for the general creditors, and to obtain evidence to aid them in prosecuting such claim."

And it was said by this Court in *Cameron* v. *United States*, 231 U. S. 710, 717, that:

> "In order to arrive at the true meaning of § 21a other provisions as well as the purpose of the act

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[15] Judge Lowell was a recognized authority on bankruptcy law, and was the draftsman of the Bankruptcy Act introduced in Congress in 1883. See *Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U. S. 320, 334.

> must be had in view. The object of the examination of the bankrupt and other witnesses to show the condition of the estate is to enable the court to discover its extent and whereabouts, and to come into possession of it, that the rights of creditors may be preserved."

A decision that the bankruptcy court may protect this power of examination under § 21(a) by enjoining premature contest by adverse parties of the same questions in other courts should rest on obvious principle. However, the practical advisability of the principle is strikingly illustrated by the present case, in which the contrary doctrine has been applied by the Circuit Court of Appeals in favor of a corporation whose officers have actually refused to testify and to produce books and records under § 21(a), and against whom contempt proceedings are actually pending. Yet, says the Circuit Court of Appeals, these are the parties who can foreclose the trustee by instituting a proceeding elsewhere which will be finally determinative of all the issues, and it is the *duty* of the trustee to follow them where they choose and there to sustain the burden of defense, although the liquid assets of the estate do not permit such defense to be adequately conducted.

B. The propriety of the bankruptcy court's exercise of its injunctive power receives additional support from the supplemental record, which was admitted by the Circuit Court of Appeals on motion of All Continent.

The fact that shortly after the granting of the injunction order, and pursuant to authorization of the bankruptcy court, the trustee instituted a comprehensive plenary

suit against All Continent in the New Jersey Chancery Court appears from the "supplemental record" which was admitted by the Circuit Court of Appeals on motion of All Continent[16] (R. 35-36). This record further discloses that the plenary suit is a comprehensive action in equity to recover, among other things, all of the assets of All Continent, and to have decreed the trustee's beneficial ownership of the stock of All Continent (R. 36-88), all of which stock, it will be recalled, is registered on its books in the name of the bankrupt (R. 4, 11, 39, 69).

Respondent may argue that the plenary suit may not be considered here. We think the argument unsound.

First, All Continent is not in a position to object to the inclusion in the record of the bill of complaint in the plenary suit, which was placed there upon its own motion before the Circuit Court of Appeals. In effect, the Circuit Court of Appeals (before passing upon the injunction of the bankruptcy court) wished to be fully informed as to the facts, or at least was willing to be so informed on motion of All Continent. We take it that this Court in reviewing the action of the Circuit Court of Appeals will certainly not limit its horizon to one less broad then the one before that court whose action it is reviewing.

Second, the fact that the plenary suit was commenced after the entry of the injunction order should not be a ground of objection, as this would be simply another way of arguing that subsequently occurring facts should not be in the record where the propriety of the bankruptcy court's

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[16]This suit has since been removed to the United States District Court for New Jersey. The rather unusual circumstances under which this removal was effected are explained at pp. 53-55, *infra.*

order is the subject of review. Were it true, however, that the institution of the plenary suit is an element necessary to sustain the injunction of the bankruptcy court,—that is to say, if the other evidence before the bankruptcy court were insufficient to sustain it, but this additional item would be sufficient to sustain it,—then the Circuit Court of Appeals was in a position to sustain it in view of its admission of this item to the record.

1. *The institution of the plenary suit was a further step in the exercise of jurisdiction over the controversy by the bankruptcy court, which it properly protected by the injunction order.*

The trustee's plenary suit raises every issue between All Continent and the trustee. If the trustee is successful, all of All Continent's property will become part of the estate. Whatever may have been the effect of the filing of a claim, and of the contentions made by the trustee as a result of the § 21(a) examinations, the bringing of this suit with the consent of the bankruptcy court clearly amounted to a joinder of issue on the vital questions as to the validity of All Continent's adverse claim.

2. *The trustee in bankruptcy is admittedly the record owner and claims to be the beneficial owner of the stock of All Continent Corporation. The issue as to beneficial title to the stock is and can be presented only in the suit instituted by the trustee in New Jersey. If the trustee succeeds on that issue, the Pennsylvania suit will become moot. The prosecution of the Pennsylvania suit before determination of that issue therefore constitutes a waste of the assets of the bankrupt estate.*

The evidence in the § 21(a) examinations is undisputed that the certificate representing all of the stock of All Continent Corporation was originally issued to the bankrupt William Fox and still stands in his name (R. 4-11, 37, 39, 69). The record title to this stock accordingly became vested in the trustee in bankruptcy by operation of law.

The dispute respecting title to the stock, as distinguished from the assets, of All Continent, therefore, relates only to the beneficial title which is claimed by both the trustee and the bankrupt's wife (R. 38, 53, 55-61, 69). If the trustee succeeds in establishing himself as the owner of all the stock of All Continent, the issue heretofore discussed,—the issue as to whether All Continent is the *alter ego* of the bankrupt—is of no consequence.

The trustee has taken steps by his bill of complaint filed in New Jersey Chancery (R. 36-88) to establish his claim of beneficial title to this stock. This issue being between the trustee, a resident of New Jersey, and the bankrupt's wife (also a resident of New Jersey) respecting the title to the stock certificates in a Delaware corporation, which certificates are physically located in New Jersey (R. 3, 10[17]), obviously cannot be presented in any suit commenced in Pennsylvania. No attempt has been made to litigate this issue in the Pennsylvania suit now pending. Yet if the trustee should prevail on this issue, it is obvious that litigation of the issue

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[17]While the physical location of the certificates does not appear from the printed record in this Court, it appeared from the record of the § 21(a) examinations (Vol. 3, pp. 97-99) that they were physically offered in evidence at Atlantic City. This § 21(a) record was considered by the bankruptcy court in granting the injunction herein but was omitted by All Continent from its printed record on appeal.

of identity between the bankrupt and All Continent would be unnecessary either in the Pennsylvania suit or in the bankruptcy court, for that would be an issue between the trustee as trustee and the trustee as owner of All Continent.

The defense of the Pennsylvania suit, necessarily at substantial expense to the trustee,[18] before determination of the issue as to ownership of the stock of All Continent, therefore constitutes a waste of assets of the bankrupt estate in the trial of what may be, and very likely is, a moot question.

C. The propriety of the bankruptcy court's exercise of its injunctive power receives additional support from the facts in the *Matter of Steelman* record.

The additional facts appearing from the *Matter of Steelman* record are as follows:

(a) The date of filing of the claim of All Continent was June 19, 1936, and the amount for which it was filed was $417,258.19 (*Matter of Steelman*, R. 20).

(b) The counsel for one of the creditors, Capital Company[19] objected to All Continent's claim immediately after it was filed, on the grounds quoted at pages 20-21 of the *Matter of Steelman* record.[20]

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[18]Which he cannot in any event (with his $100) afford, unless the creditors finance him.

[19]Capital Company was the respondent before this Court in *Fox* v. *Capital Company*, 299 U. S. 105. It was naturally ahead of the trustee in its knowledge as to the relations between the bankrupt and All Continent, as it acquired that knowledge in the course of the New York proceedings (prior to the bankruptcy), which were the subject matter of the above-mentioned case in this Court.

[20]Its objection appears at page 15 of the stenographer's minutes of the meeting of creditors June 19, 1936, which were before the district court when it granted the injunction herein, but were not incorporated by respondent in its record on appeal to the Circuit Court of Appeals.

(c) All Continent, the bankrupt, the members of his family, and his employees were engaged in a comprehensive conspiracy, of which the Pennsylvania suit was a part, to impede, delay, and prevent the payment of the bankrupt's creditors both before and after the bankruptcy. Among the other facts establishing such a conspiracy are the following:

(1) The bankrupt transferred to All Continent in 1930 assets worth at least $6,950,000 and then proceeded to dominate and control its affairs, dealing with its assets as if they were his own personal assets (*Matter of Steelman,* R. 5; R. 4, 11, 37, 39-47, 67-83).

(2) After a judgment had been obtained against the bankrupt in the United States District Court for the Southern District of New York by Capital Company, he refused to appear and be examined concerning his assets pursuant to a subpoena in supplementary proceedings, for which he was subsequently adjudged in contempt by that court (*Matter of Steelman,* R. 9-10; *Fox* v. *Capital Company,* 299 U. S. 105).

(3) After his adjudication in bankruptcy, the bankrupt unsuccessfully sought to enjoin the examination of third parties as to his assets in New York by Capital Company (in its supplementary proceedings), although Capital Company's counsel had stated in open court that any information so obtained would be made available to the trustee without expense (*Matter of Steelman,* R. 13-16, 154-165).

(4) During the course of § 21 (a) examinations, Herbert Leitstein, an officer of All Continent and the bankrupt's personal secretary (as well as Eva Fox, the bankrupt's wife, and president of All Continent), wilfully refused to testify concerning the affairs of the bankrupt and All Continent, for which he was also cited for contempt by the referee (*Matter of Steelman,* R. 16).

(5) All Continent refused to make its books available for audit pursuant to the order of the referee already mentioned (which was affirmed by the bankruptcy court with modifications affecting only the manner of conducting the examination, 16 F. Supp. 950) and took an appeal to the Circuit Court of Appeals, Third Circuit, which was argued and is still undetermined (*Matter of Steelman,* R. 17).

(6) After the decision of the Circuit Court of Appeals under review here, All Continent applied for and obtained, by an ancillary bill of complaint in the Pennsylvania action (*Matter of Steelman,* R. 182-193), a complete and comprehensive injunction against "the prosecution of the suit commenced by" the trustee in the New Jersey Chancery Court, pending the determination of the issues in the Pennsylvania suit. (*Matter of Steelman,* R. 25-28). The order enjoined all action by the trustee in that suit, without even being limited to such part of the suit as affects All Continent. (*Matter of Steelman,* R. 117-118).

The power of this Court to take notice of the facts contained in the record in *Matter of Steelman,* which is now pending before this Court, has been discussed *supra* at page 2 (footnote 1). All Continent had an opportunity to raise any issue of fact as to the allegations of the petition for prohibition or mandamus when it filed its objections to the granting of a temporary restraining order in that proceeding, but it failed to do so. The facts alleged in that petition are true and undisputed, and are taken for the most part from the unquestioned records in court proceedings. We assume that this Court will consider them, both on authority, and because on principle this Court should have all the facts before it as to what actually transpired in the courts below.

1. *The record in Matter of Steelman discloses that the Pennsylvania suit was simply one step in a comprehensive conspiracy by All Continent, the bankrupt, the members of his family and his employees to impede, delay and prevent the payment of the bankrupt's creditors both before and after the bankruptcy. As such it was properly enjoined.*

The facts, other than the institution of the Pennsylvania suit by All Continent, which demonstrate the existence of a comprehensive conspiracy between All Continent, the bankrupt, the members of his family and his employees to impede, delay and prevent the payment of the bankrupt's creditors, both before and after the bankruptcy, have been stated *supra* at pages 46 to 47. The bankruptcy court's power to enjoin the particular phase of such conspiracy involved in the Pennsylvania suit and the propriety of its exercise of that power under the facts of this case need no further elaboration.

2. The fact that objection to All Continent's claim as a creditor of the bankrupt had already been made by another creditor, Capital Company; is an additional basis for the argument that the bankruptcy court, before the institution of the Pennsylvania suit, had acquired jurisdiction of the controversy between All Continent and the trustee as to the identity of All Continent and the bankrupt.

The fact that objection was actually made by counsel for Capital Company to All Continent's claim (quoted in *Matter of Steelman*, R. 20-21) on the day it was filed (*Matter of Steelman*, R. 20), considered together with the facts appearing in the trustee's petition (particularly the events in the § 21(a) examination) would seem to bring this case directly within the principle of *Bronx Brass Foundry, Inc.*, v. *Irving Trust Co.*, 297 U. S. 230 and *In re Steinreich Associates, Inc.*, 83 F. (2d) 740 (discussed at pages 34 to 36). After the very issue of All Continent's identity with the bankrupt had been raised in the bankruptcy proceedings, All Continent attempted to remove that controversy from the bankruptcy court (not by withdrawing its claim as in the above cases, but by commencing a race of diligence to have that issue first determined by the Pennsylvania court).

D. It may well be that the filing of a claim by All Continent, in the circumstances of this case, conferred on the bankruptcy court exclusive jurisdiction over this controversy.

In summary, we submit that the power of the bankruptcy court to issue this injunction cannot seriously be disputed. Indeed, it may well be (although a decision to that effect is not necessary to a decision of this case in our favor) that the true rule must be that in the circumstances here presented (filing of the claim by the adverse

party, conduct of the § 21(a) examinations, and the referee's order and report relating to the identity of All Continent with the bankrupt) the bankruptcy court has not only acquired jurisdiction to issue an injunction, but has acquired *exclusive* jurisdiction over the controversy as to ownership of the All Continent assets, such jurisdiction being prior and therefore paramount to that of the Pennsylvania District Court or any other court.

The establishment of that principle, although in a strict sense unnecessary to the decision of this case, is appropriate and called for in this case. The reason is that, by numerous and unnecessary *dicta,* the Circuit Court of Appeals has laid down precisely the opposite principle, saying not merely that the bankruptcy court lacked the power to issue this injunction, but further that the Pennsylvania court should have "exclusive" jurisdiction of the controversy as to ownership of the assets. Such *dicta* must have a profound effect on all of the lower courts in the third circuit, in which all further proceedings in respect of this bankruptcy must occur (whether in the bankruptcy court itself, or in the United States District Court of New Jersey in which the trustee's plenary suit is now pending, or in the United States District Court for the Eastern District of Pennsylvania). These *dicta* amount in effect to instructions for those courts, and unless this Court replaces them by sound instructions, the prejudicial effect of the opinion below to the trustee and to creditors of this estate will not have been effectively removed.

Specifically, the *instruction* which would appear appropriate (as supplemental to the *decision* that the bankruptcy court had power to issue the injunction appealed from) is an instruction that the Circuit Court of Appeals was in error in holding that the Pennsylvania court had

exclusive jurisdiction of the controversy between the trustee and All Continent as to the ownership of the assets claimed by All Continent, and that, on the contrary, the filing of a proof of claim in the bankruptcy proceedings by All Continent, and the development by the § 21(a) examination of evidence strongly indicative that the assets of the bankrupt never truly passed to All Continent, combine to give exclusive jurisdiction over that controversy to the bankruptcy court, subject at most to the bankruptcy court proceeding with due order and expedition to resolve that controversy, *first* by completing the § 21(a) examinations (once the officers of the respondent have ceased to be in contempt and have tendered their evidence and their books), and *second,* by trying the issue out on the defense of the claim itself, or in the plenary suit already instituted by the trustee under the supervision of the bankruptcy court.

POINT III

THE *DICTA* OF THE CIRCUIT COURT OF APPEALS (NOTABLY THE *DICTUM* THAT THE PENNSYLVANIA COURT HAS EXCLUSIVE JURISDICTION OF THE CONTROVERSY BETWEEN THE TRUSTEE AND THE RESPONDENT CORPORATION) SHOULD THEMSELVES RECEIVE THE ATTENTION OF THIS COURT, AS THEY ARE DEFINITELY PREJUDICIAL TO THE TRUSTEE, AND IN ANY EVENT THEIR INCLUSION IN THE OPINION OF THE CIRCUIT COURT OF APPEALS REPRESENTS AN EXTREME DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The dicta in question are:

(1) A cloud is created on the title of All Continent to certain securities, as a result of the issuance by the United

States District Court for the Southern District of New York, at the suit of a creditor, of a subpoena containing an injunction authorized by § 781 of the Civil Practice Act of New York to the effect that a "third person * * * is hereby forbidden to transfer * * * property belonging to the judgment debtor * * * until the further order of the court" (R. 102, 104).

> The most that can be said of this injunction is that it suggests the possibility that some property (not identified) in the name of All Continent may belong to Fox. Whether the mere issuance of a subpoena to testify and to produce books and records constitutes in itself a cloud on *title* to the securities in respect of the ownership of which such evidence is sought, is at the very best a question open to substantial doubt, and on which the Circuit Court of Appeals should not thus have foreclosed itself in advance.

(2) The Pennsylvania court is the "only court that can" remove "the cloud upon the title to the securities" (R. 104).

> Obviously, the United States District Court for the Southern District of New York could have removed the "cloud", if such it be, which it had itself created; and the Pennsylvania court was not the only court that could do so.

(3) The controversy in the plenary action filed by the trustee in the New Jersey Chancery Court is, so far as All Continent is concerned, "substantially the same controversy that is involved in the Pennsylvania Court" (R. 105).

But the Pennsylvania action involves only certain specific assets claimed to be owned by All Continent, and the effect thereon of the third party subpoena issued by the New York court; whereas the action in the Court of Chancery of New Jersey involves all of the assets of All Continent. The distinction is a substantial one. The referee has reported that the bankrupt himself "retained in his possession and under his control, the securities forming the assets of the Corporation" (R. 4, 11); but it may develop that this was true as to some of the assets and not true as to others. That differentiation, if it exists, can be recognized in the New Jersey action, in which all of the assets are involved, but cannot be recognized in the Pennsylvania action, which concerns only the assets specifically situated in Pennsylvania. Indeed, a later clause of the referee's report itself recognizes the possibility of differentiation between different assets, for it says that "*in numerous instances,* the bankrupt dealt with the assets of corporation as his own." There may have been other instances in which he did not do so.

Furthermore, the Pennsylvania suit does not necessarily involve the issue of fraud raised by the trustee against All Continent in the New Jersey plenary suit. All Continent might in the Pennsylvania suit establish title (free of the so-called cloud), but would not thereby establish that the title was not originally obtained through a fraudulent conveyance to the bankrupt.

(4) "This bill in the Court of Chancery, while having no bearing upon the conclusion reached in this opinion,

really sets forth two separable controversies. By the one between the trustee and the appellant [All Continent], the trustee seeks to obtain all the property claimed by the appellant and in this the appellant is the only necessary party defendant; by the other, he seeks to set aside a certain trust agreement and in this the other defendants are the only necessary parties defendant" (R. 105).

The Circuit Court of Appeals itself labeled this as a *dictum*, stating that it "had no bearing upon the conclusion reached in this opinion." However, the *dictum* was of material importance, as in effect it instructed the courts below that the plenary action in the Court of Chancery of New Jersey was removable to the Federal Court. At the time that the opinion of the Circuit Court of Appeals was filed (December 1) the defendants in the New Jersey action had not sought to remove it. But immediately upon the filing of the opinion of the Circuit Court of Appeals, they made a motion in the State Court of New Jersey to remove the action.

This was far more serious than merely prejudging a question which otherwise would ultimately have come before the Circuit Court of Appeals in its appellate capacity. It was an usurpation by the Circuit Court of Appeals, in that there is no procedure for review in that court of a decision of a district court remanding an action on jurisdictional grounds as not removable.[21]

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[21]28 U. S. C. § 71 (Judicial Code Sec. 28, Act of Mar. 3, 1887, c. 373, 24 Stat. 552, corrected and re-enacted by Act of Aug. 13, 1888, c. 866, 25 Stat. 433); *Employers Reinsurance Corporation* v. *Bryant*, 57 Sup. Ct. Rep. 273, 275-276 (not yet

> Yet this expression of opinion by the Circuit Court of Appeals could not fail to have great influence over a lower court which, although a contrary decision by it could not be reviewed in this particular case, is subject in almost all other cases to a review of its decisions by the appellate court that uttered the *dictum*.

(5) "In order for the trustee to establish his ownership of all of the property of the appellant [All Continent] including the securities in the possession of Sparks & Co., on the ground that it in fact belonged to Fox, it is necessary for him to prove all of his averments in his bill in the Court of Chancery which relate to the appellant. The same proof will have to be made in the Pennsylvania Court as to the securities here in question" (R. 105).

> It is not necessary for him to prove *all* of his averments. He may recover against All Continent in the Court of Chancery of New Jersey on either of several grounds; for example, he may establish as to all or part of the alleged properties of All Continent (1) that they never really passed to All Continent at all and have continued in the possession and under the control of the bankrupt, or he may establish (2) that they passed to All Continent but have been directly controlled and administered by Fox while merely using the name of All

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officially reported); *Chicago, Burlington and Quincy Railway Company* v. *Gray*, 131 U. S. 396; *Morey* v. *Lockhart*, 123 U. S. 56. See also: *Pacific Live Stock Company* v. *Oregon Water Board*, 241 U. S. 440, 447; *Powers* v. *Chesapeake and Ohio Railway Company*, 169 U. S. 92, 97-98; *Missouri Pacific Railway Company* v. *Fitzgerald*, 160 U. S. 556, 582.

Continent, or finally (3) that they have been directly administered by All Continent but as the mere agent, dummy or instrumentality of Fox and always subject to his direct and immediate dictation. Under any one of these three views, the particular asset or assets in question, or perhaps all of them, might become the property of the estate and not of All Continent; but proof of any one of the three propositions would be sufficient, and it would not be necessary therefore to prove all of them.

Furthermore, if the trustee succeeds in establishing his contention in the New Jersey Chancery suit that he owns the *stock* of All Continent, it will be unnecessary for him to prove anything respecting ownership of the assets. He will own the owner.

(6) From the previous *dictum*, the Circuit Court of Appeals next drew a further erroneous conclusion:

"Under these circumstances, a decree made in favor of appellee [the trustee] in the Pennsylvania suit could only be based upon a finding by that Court that all of the assets of the appellant belong to the appellee." (R. 105)

We have already pointed out the fallacy of the view that the trustee must prevail in respect of all of the assets before he can prevail as to any of them. The reverse is true—that he can prevail as to some of them without prevailing as to the others.

(7) The next sentence reads:

"Such a finding would be binding and conclusive upon appellant [All Continent] not only in the Pennsylvania

court, but in every other court in which that question might be litigated between the parties." (R. 105)

> Here we have a *dictum*, unique in that it is favorable to the trustee and adverse to All Continent. But we will have to forego its benefits, as again it appears to be erroneous. As the Pennsylvania action involves only particular assets, and as it may be determined upon the basis of findings of fact relating only to the administration of those particular assets, it could not, if adverse to All Continent, preclude that corporation from presenting other grounds to contest efforts by the trustee in other jurisdictions to recover other assets. Another court could disregard a finding by the Pennsylvania court that *all* of the assets of All Continent truly belonged to the trustee, and could properly hold that that finding was too broad, as it was neither true that all of the assets of All Continent were involved in the Pennsylvania action nor that the decision in regard to the particular assets in the Pennsylvania action necessarily determined all of the questions and controversies that might arise in regard to other assets elsewhere.

(8) The Circuit Court of Appeals proceeds (R. 105):

"Under these circumstances, the Pennsylvania Court having first acquired jurisdiction of the property and controversy is entitled to exclusive jurisdiction and the institution of the suit in chancery was an attempt to oust the Pennsylvania court of the jurisdiction which it had previously and validly acquired."

Here is a double-barreled error, in that (1) the "property" of which the Pennsylvania Court had jurisdiction was not all of the property, title to which is involved in the plenary action in New Jersey, and (2) that there may be other controversies between the trustee and All Continent arising in the plenary action in New Jersey which are not presented in Pennsylvania.

In any event, it is plainly erroneous to hold that the Pennsylvania Court has "exclusive" jurisdiction of all controversies between the trustee and All Continent involving the property of the latter. Yet that the use of the word "exclusive" was not unintentional is proven by the next sentence of the opinion of the Circuit Court of Appeals:

(9) "The appellant [All Continent] is entitled to maintain the exclusive jurisdiction which it thus acquired under the authority of section 57 of the Judicial Code and may, upon proper application, restrain the trustee from litigating the controversy elsewhere". (R. 105)

Here is the logical and fatal culmination of the chain of erroneous *dicta*. Says the Court: By its bold stroke in Pennsylvania, the corporation against which the trustee was patiently and in an orderly manner accumulating evidence in § 21(a) proceedings has "acquired" exclusive jurisdiction for the Court of its choice to oust the trustee from further action,—indeed, may actually "restrain the trustee from litigating the controversy elsewhere".

As appears in *Matter of Steelman*, R. 117-118, 194-195, all Continent did in fact, forthwith and on

the same day of the filing of his opinion in the Circuit Court of Appeals, obtain from District Judge Welsh of the Eastern District of Pennsylvania an injunction against further litigation of the controversy by the trustee in his plenary suit in New Jersey.

The trustee is thereby dragged into a controversy in a foreign court "wherein the estate might lose much" but could gain little or nothing (*Fulton Bank* v. *Hozier*, 267 U. S. 276, 280). Indeed, the language of this dictum would indicate that, in the opinion of the Circuit Court of Appeals, petitioner cannot even oppose respondent's claim on this ground in the bankruptcy proceedings.

Moreover, if the mere filing by All Continent of its bill in Pennsylvania did (as the Circuit Court of Appeals says) confer such jurisdiction over the controversy on the Pennsylvania court as would prevent other courts from considering the same controversy, then on the same argument the Pennsylvania court was itself precluded by the prior presentation of the same controversy in the New Jersey bankruptcy court as a result of the filing there of a proof of claim by All Continent, and the development there in orderly § 21(a) proceedings of a defense thereto by the trustee. This is the position that we have taken in Point II, *supra*, pages 49 to 51.

(10) "The Capital Company has been *and is* seeking to get these securities, not for the creditors as a whole but for itself" (Italics ours) (R. 106).

Prior to the bankruptcy, the Capital Company was, of course, in obtaining the third party subpoena in New York, seeking to get the securities for itself. See *Fox* v. *Capital Company*, 299 U. S. 105. But after the bankruptcy, the Capital Company was precluded from getting the securities for itself, except through proceedings in the bankruptcy court.

True, the position of the Capital Company was that the securities actually belonged to the bankrupt, and not to All Continent. But after the bankrupt had filed his voluntary petition, constituting a *caveat* and an injunction against the world (*Mueller* v. *Nugent*, 184 U. S. 1, 14; *Acme Harvester Company* v. *Beekman Lumber Company*, 222 U. S. 300, 306), the Capital Company could no longer assert any superior rights to any particular assets of the bankrupt elsewhere than in the bankruptcy court, except, of course, with prior leave of the bankruptcy court.

True it is that presumably the Capital Company will assert in the bankruptcy court such claim as it might have to preferential treatment as a result of its activities in the New York courts prior to the bankruptcy.[22] Of that claim, the Circuit Court of Appeals rightly says that it will be "adverse to the interests of the trustee who represents all the creditors generally". But the *forum* for determination

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[22]**Indeed, the Capital Company has asserted its position in the bankruptcy court, although there is no reference thereto directly in the record, for, of course, the point was not properly involved in this case, and came in only as a result of the *dictum*.**

of that controversy is the bankruptcy court. Yet the Circuit Court of Appeals concludes:

(11) "It is, therefore, not only his [the trustee's] right to appear in the Pennsylvania court and defend that suit, but it is his official duty, and neglect or failure to do so would be a clear breach of that duty" (R. 106).

There can be no *duty* on the trustee necessarily to appear in the Pennsylvania court, for, so long as he abstains therefrom, no action therein can become *res judicata* against him or the estate for which he is acting.

The Pennsylvania action represents only an effort by All Continent to remove the alleged cloud of the third party subpoena. Suppose it fails. It does not pass any property to the Capital Company as against the trustee; it only establishes that, as between All Continent and the Capital Company, the former is still restrained by the outstanding order of the United States District Court for the Southern District of New York.

This Court has recognized, in *Local Loan Company* v. *Hunt*, 292 U. S. 234, 241, the dangerous effects of such pre-determinations of questions by appellate courts:

"* * * As will be shown in a moment, the sole question at issue is one which the highest court of the State of Illinois had already resolved against respondent's contention. The alternative of invoking the equitable jurisdiction of the bankruptcy

> court was for respondent to pursue an obviously long and expensive course of litigation, beginning with an intervention in a municipal court and followed by successive appeals through the state intermediate and ultimate courts of appeal, before reaching a court whose judgment upon the merits of the question had not been predetermined."

Dicta by courts of first instance are comparatively harmless in that they are truly mere expressions of opinion. But *dicta* by appellate courts are in fact instructions to the courts within their jurisdiction. Under the Federal system, the decisions of our Circuit Courts of Appeals are final in respect of substantially all questions, and it behooves those courts to be peculiarly cautious in the avoidance of unnecessary *dicta*.

And the *dicta* for which it is the most difficult to find an excuse are those upon questions which were not even argued. Were the question present or lurking in the record, and argument had thereon, it might be easy to defend a *dictum* as useful to guide the lower courts in the future on a question on which the appellate court had had ample opportunity to reach a reasoned conclusion. But this was not the case here.

In effect, the learned court below has now taken so comprehensive and sweeping a position in respect of all the problems involved in this bankruptcy, that it appears to the trustee and to the creditors that they must now look only to this Court for appellate review meeting "the requirements of justice."

Many of the questions in this bankruptcy will presumably again and at the proper time come before the same Circuit Court of Appeals, whether on appeals from further

proceedings in the United States District Court for the Eastern District of Pennsylvania, or from the various proceedings in the bankruptcy court in the District of New Jersey, or from the plenary action now pending (pursuant to the hint as to removal from the Circuit Court of Appeals in this case) in the same United States District Court for the District of New Jersey.

If this Court does not now exercise its power to review the *dicta* of the Circuit Court of Appeals, and in explicit terms to advise and instruct the Circuit Court of Appeals and the lower courts within its jurisdiction in regard to the true rules applicable to the subject matter of those *dicta*, the whole course of future proceedings in the bankruptcy will again be subject to an appellate review which will "be inadequate to meet the requirements of justice" (*Local Loan Co.* v. *Hunt*, 292 U. S. at p. 241).[23]

Just as in the *Local Loan Company* case it was necessary for the Federal Court to intervene because the highest court of the State of Illinois had already expressed its adverse opinion, and consequently a course of hearings through the State courts of Illinois would provide a practically inadequate (although theoretically adequate) mode of relief, so here the future course of proceedings in this bankruptcy in the third circuit cannot provide a practically adequate relief to the trustee and the creditors, unless there

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[23]It is submitted that this Court is not precluded in principle even to "substitute itself as the direct appellate tribunal from *nisi prius*, in the place and stead of the Circuit Court of Appeals" (Robertson & Kirkham, "Jurisdiction of the Supreme Court", p. 210), provided the case be of an extraordinary character, as where the Circuit Court of Appeals has, by an indiscriminate use of *dicta* on points not argued, deprived itself of the capacity impartially and judicially to pass on questions that may subsequently arise out of the subject-matter of the *dicta*.

shall have been a prior exercise by this Court of its broad power to set the Circuit Court of Appeals upon the right track.

Yet the Illinois case was less serious than the present one. There the Supreme Court of Illinois had predetermined the question by a decision properly necessary to the determination of a case duly presented to it. Here, on the other hand, the appellate court in question has acted by mere *dictum*. Yet a *dictum* is scarcely less difficult to reverse in the court that has uttered it, than is a decision. He who must induce a Circuit Court of Appeals to reverse a prior deliberate expression of its opinion has assumed a task in which he faces an almost insurmountable obstacle from the outset, and in the undertaking of which he is not given practical protection by the mere availability of the argument that what was said before was *dictum*.

It is respectfully submitted that the *conduct* of the learned Court below has so far departed from the accepted and usual course of judicial proceedings as to call for exercise by this Court of its power of supervision.

CONCLUSION

THE DECISION OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVERSED AND THE INJUNCTION OF THE DISTRICT COURT REINSTATED. THE PREJUDICIAL *DICTA* OF THE CIRCUIT COURT OF APPEALS SHOULD BE REVIEWED AND MODIFIED.

Respectfully submitted,

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Counsel for Petitioner.

March, 1937.

APPENDIX

Bankruptcy Act, § 21(a)

(Act of Cong., Feb. 5, 1903, c. 487 § 7, 32 Stat. 797, 798; 11 U. S. C. § 44(a))

"(a) A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt and his wife, to appear in court or before a referee or the judge of any State court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this Act: *Provided* that the wife may be examined only touching business transacted by her or to which she is a party, and to determine the fact whether she has transacted or been a party to any business of the bankrupt."

Judicial Code § 28

(Act of Cong., March 3, 1887, c. 373, § 2, 24 Stat. 552, 553, corrected and re-enacted by Act of Cong., August 13, 1888, c. 866, § 2, 25 Stat. 433, 435; 28 U. S. C. § 71)

"* * * Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed. * * *"

Judicial Code § 57

(Act of Cong., March 3, 1911, c. 231, § 57, 36 Stat. 1087, 1102; 28 U. S. C. § 118)

"When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or

cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State, *Provided, however*, That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment

by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law."

New York Civil Practice Act § 781

(New York Laws, 1935, c. 630)

"Upon the service of the subpoena upon the judgment debtor or any third party who has in his or its possession property or moneys belonging to the judgment debtor or claimed by the receiver of the said judgment debtor or who is indebted to the judgment debtor, such judgment debtor or third person is hereby forbidden to transfer, pay over or otherwise dispose of such moneys or property belonging to the judgment debtor or thereafter acquired by or becoming due to him, not exempt by law from application to the satisfaction of the judgment, until the further order of the court. Any person served with said subpoena, who shall violate the provisions of such restraining provision, shall be subject to punishment by the court by fine and imprisonment or either, as and for a contempt. To effect such restraining provision, a copy of this section must be endorsed upon the copy of the subpoena served under this article."

Bankruptcy Act, § 68

(Act of Cong., July 1, 1898, c. 541, § 68, 30 Stat. 544, 565; 11 U. S. C. § 108)

"(a) In all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.

"(b) A set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy."

FILED
MAR 29 1937
CHARLES ELMORE CR
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936. No. 638.

HIRAM STEELMAN, Trustee in Bankruptcy of WILLIAM FOX, a Bankrupt,

Petitioner,

vs.

ALL CONTINENT CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S REPLY BRIEF

WM. ELMER BROWN, JR.,
C. BREWSTER RHOADS,
WM. D. WHITNEY,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936. No. 638.

HIRAM STEELMAN, Trustee in Bankruptcy of WILLIAM FOX, a Bankrupt,
Petitioner,

vs.

ALL CONTINENT CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S REPLY BRIEF

THE ISSUES

The first issue is:

Does a bankruptcy court *ever* have *power* to enjoin litigation of a controversy involving property *not* in its actual or constructive possession?

It is conceded that if such power exists it was properly exercised on the present record (Respondent's brief, pp. 2, 3).

There are three cogent reasons for the exercise by the bankruptcy court in this case of its admitted "power to issue

an injunction when necessary to prevent the defeat or impairment of its jurisdiction."[1] These reasons are:

(1) The record in this case shows that both the bankrupt and All Continent have themselves submitted to the bankruptcy court the issue as to whether All Continent is the *alter ego* of the bankrupt,—the bankrupt, by scheduling All Continent as a creditor to the extent of $417,258.19 (R. 44, 79), and All Continent, by filing a proof of claim (R. 8, 15). The mere pendency of the subsequently commenced Pennsylvania suit shows the supervening attempt in the name of All Continent to embarrass and frustrate the bankruptcy court in an orderly adjudication of this issue.

(2) The record in this case makes it clear that the trustee, with only $100 of liquid assets (R. 8, 15), can ill afford either a duplicate or a distant litigation of the controversy between him and All Continent. If the trustee be required to defend the Pennsylvania suit on the merits, he will necessarily be forced to spend money he does not have and to neglect his duties in the administration of the estate. His time, and money (if he had any), would be spent in giving attention to a litigation in a foreign jurisdiction, in which the bankruptcy court has found (R. 29-30, 32), and respondent has conceded (Brief, pp. 1-3), the trustee was *improperly* made a party.[2]

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[1]Compare Respondent's Brief, p. 31. Quotation from *Continental Illinois National Bank & Trust Company* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648, 675.

[2]The concession by respondent occurs in its acceptance, as the "question presented", of a question expressed upon the assumption that the trustee was improperly made a party to the Pennsylvania suit. Respondent could not well have done

(3) The Pennsylvania suit obviously presents questions on which the trustee will be unprepared to go to trial in any jurisdiction (even though able to prepare a pleading relating thereto) without a full and complete investigation of the facts in Section 21(a) examinations in the bankruptcy court. It is no answer to say that the trustee stands in the shoes of the bankrupt. He may succeed to the bankrupt's rights and liabilities vis-a-vis third parties. But he does not succeed to the bankrupt's knowledge. Until he has acquired that from the bankrupt through Section 21(a) proceedings, he is at an impossible disadvantage in litigation against such third parties. It is not fitting, therefore, that the purpose of Section 21(a) examinations should be frustrated by allowing the witness (here, All Continent) to take his controversy to a foreign jurisdiction for premature[3] litigation against an impecunious and uninformed trustee.

No attempt has been made by petitioner to uphold the injunctive power of the bankruptcy court on the ground

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otherwise, as the trustee clearly *was* an improper party to the Pennsylvania suit. That suit shows nothing more than verbal assertions by the trustee that whatever "cloud" Capital Company had created should be continued in *statu quo* (R. 21, 22). A bill in equity will not lie to dispel mere verbal assertions. *Devine* v. *Los Angeles*, 202 U. S. 313, 334; *Richardson* v. *Pennsylvania Coal Co.*, 203 Fed. 743 (D. C. M. D. Pa. 1913); 78 A. L. R. 24, 40-43.

[3]Respondent's argument of necessity is specious. The District Court for the Southern District of New York, out of which the subpoena issued, could, and undoubtedly would, upon a proper application, permit sales out of the account and the retention of the proceeds by Sparks & Company, or permit transactions in the regular and ordinary course of business, provided that the fund impounded by the service of the subpoena remained intact, though it changed in form, through such sales.

that the property of All Continent Corporation is in the *possession* of that court. The argument is that the bankruptcy court has power to enjoin an attempt by an adverse claimant to litigate issues with the trustee in a foreign jurisdiction, where (1) such issues have already been presented to the bankruptcy court by the adverse claimant and will necessarily be litigated there regardless of the foreign suit; (2) the circumstances indicate that in defending the foreign suit the trustee will be subjected to inconvenience amounting to a practical denial of his day in court; (3) the trustee is not a proper party to the foreign suit; and (4) the purpose of Section 21(a) examinations will be frustrated by forcing the trustee into a foreign trial without the information needed to defend. The argument is that the power exists in such cases regardless of whether the property involved is in the possession of the bankruptcy court or in the possession of the adverse claimant; that this is especially true where the bankrupt is "Dr. Jekyll" and the adverse claimant bears an exceedingly strong resemblance to "Mr. Hyde".

The second issue, presented by the *opinion* of the Circuit Court of Appeals, which respondent (for obvious reasons) expresses a desire to omit from discussion, is whether, by the utterance of eleven prejudicial dicta, the Circuit Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision."[4]

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[4]**Reason No. 2 for granting the writ, as stated in the petition for certiorari, page 10.**

POINT I.

RESPONDENT'S CASES DO NOT SUPPORT, AND PETITIONER'S CASES DEFINITELY REFUTE, THE THEORY THAT THE INJUNCTIVE POWER OF THE BANKRUPTCY COURT IS LIMITED TO RESTRAINTS AFFECTING PROPERTY IN THE POSSESSION OF THE BANKRUPTCY COURT.

In none of the cases set forth in Point I of respondent's brief did the court decide that a bankruptcy court did not have jurisdiction to enjoin an attempted predetermination of an issue involved in a claim theretofore submitted to the bankruptcy court. In none of them was it decided that the bankruptcy court was powerless to enjoin a creditor from harassing the trustee by premature, extremely inconvenient, and perhaps useless,[5] litigation in a foreign jurisdiction. In none of them was it held that the bankruptcy court lacked power to protect the trustee from the necessity of defending litigation while he was still actively engaged in investigation—including examination of the very adverse claimant who had instituted the litigation. In none of them did the court refuse to enjoin prosecution against the trustee of a suit in which he was improperly joined. In none of them did the court suggest that the bankruptcy court lacked

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[5]Respondent assumes, as part of its argument, that a fraudulent transferee may, under the guise of invoking Section 57 of the Judicial Code, force a creditor or a trustee in bankruptcy to litigate whether the transfer was in fact in fraud of creditors. No case goes so far. A mere adjudication that the fraudulent transferee had legal title, which must be assumed in any action to set aside the conveyance, would be a waste of time and money which ultimately belongs to the bankrupt estate.

power to enjoin the bankrupt from doing through his apparent *alter ego* what he could not do in his own name.

In several of the cases cited by respondent there is language to the effect that the bankruptcy court has power to enjoin an outside litigation only where the property is in the custody of the bankruptcy court. Each of such cases, however, falls into one or more of several classes clearly distinguishable from the instant case, and in each the language goes far beyond the facts (incidentally affording a good illustration of the dangers of dicta such as those uttered by the Circuit Court of Appeals in the present case):

CLASS I—*Where the only possible basis for exercise by the bankruptcy court of jurisdiction to issue an injunction was a claim that the property in question was in the possession of the bankruptcy court, and that question being decided adversely to the trustee the case was disposed of.*

The case of *Fort Dearborn Trust & Savings Bank* v. *Smalley*, 298 Fed. 45 (C. C. A. 8th, 1924), cited and discussed on pages 22-26 of respondent's brief, is a typical illustration of this. In that case a controversy as to the title of property, which had at one time belonged to the bankrupt, but had been transferred by him, had been presented to the State Court by a suit instituted by the transferee prior to the filing of the petition in bankruptcy. The trustee contended that the property was still in the possession of the bankrupt when the petition was filed and, therefore, in the custody of the bankruptcy court. On the basis of this argument, an injunction restraining certain proceedings in the suit instituted prior to bankruptcy was sought in the bankruptcy court. The Circuit

Court of Appeals determined the issue as to possession adversely to the trustee, and, since no issue involved in the State Court action had been presented in the bankruptcy court (since indeed there was no bankruptcy) at the time of the institution of the suit in the State Court, and since none of the other factors, here relied on as a basis for jurisdiction, was present, it was properly held that the bankruptcy court had no power to issue the injunction requested. The court properly said that, in the circumstances presented by *that* case, the only basis for exercise of an injunctive power by the bankruptcy court was the claim that the property was in the custody of the court and, that basis being removed, no injunction could be granted.

CLASS II—*Where there was no investigation pending in, and had been no prior submission to, the bankruptcy court of any issue presented by the litigation sought to be enjoined, either (a) because that litigation was commenced before the institution of bankruptcy proceedings, or (b) because the issue was not involved in the bankruptcy.*

The *Fort Dearborn* case, discussed as an illustration of Class I, is also distinguishable as a Type (a) case under Class II.

An additional example of Type (a) is *Molina* v. *Murphy*, 71 F. (2d) 605 (C. C. A. 1st, 1934) [Respondent's Brief, p. 26], in which the court refused an injunction restraining a foreclosure sale in a suit against one who filed a petition for composition under § 74 of the Bankruptcy Act after the foreclosure proceedings had been carried almost to a conclusion.

An example of Type (b) is *In re Adolf Gobel, Inc.*, 80 F. (2d) 849 (C. C. A. 2d, 1936) [Respondent's Brief, p. 27], in which the suit sought to be enjoined was for damages

against a solvent corporation in no way involved in the bankruptcy, except that its common stock (but not its preferred stock or bonds) was admittedly owned by the bankrupt. It was not suggested that the issues presented by this action had been, or could be, presented in the bankruptcy court.

Petition of Schwartz, 7 F. (2d) 79 (C. C. A. 1st, 1925) [Respondent's Brief, p. 27], likewise involved a simple suit for damages against attaching creditors and a sheriff. No question involved in the suit was presented in the bankruptcy proceedings and consequently no injunction was granted. Furthermore, the suit sought to be enjoined there was not an actual suit but merely a threatened suit.

Similarly, *In re Grissler,* 136 Fed. 754 (C. C. A. 2d, 1905) [Respondent's Brief, pp. 29-30], involved a mechanic's lien foreclosure action in which the trustee's only interest was that the bankrupt was a lienor. No question as to his status was presented in the bankruptcy proceedings, nor did it appear that any such question could be there presented.

To the same effect, where the notice of lien was filed prior to bankruptcy, is *In re Barber,* 7 F. Supp. 806 (S. D. N. Y. 1934) [Respondent's Brief, p. 30].

It may also be noted that in the *Grissler* case the trustee voluntarily appeared in the foreclosure action.

Indeed, each of respondent's six cases considered under Class II appears to be distinguishable under Class I as well.

CLASS III—*Where the trustee was sued for conversion following a sale of property adversely claimed.*

Cases like *In re French,* 18 F. (2d) 792 (W. D. Mich., S. D., 1927) [Respondent's Brief, pp. 27-28], and *In re*

J. M. Mertens & Co., 147 Fed. 182 (C. C. A. 2nd, 1906) [Respondent's Brief, p. 30], are trover and conversion cases, which merely illustrate the familiar principle that the trustee will not be protected by injunction in the commission of a tort. Such action by the trustee obviously does not represent "orderly administration of the bankruptcy proceedings".

CLASS IV—*Where the power of the bankruptcy court to issue an injunction was not involved.*

Heath v. *Shaffer*, 93 Fed. 647 (N. D. Iowa, E. D. 1899) [Respondent's Brief, p. 28], did not even involve an application to the bankruptcy court. The trustee there sought his injunction by a bill in equity in the Federal court. Furthermore, the court in that case expressly refused to pass upon its jurisdiction, holding merely that a sufficient showing for a preliminary injunction had not been made out.

In re John Condon Contracting Co., Inc., 1 F. Supp. 447, modified on reargument in 2 F. Supp. 52 (E. D. N. Y. 1932) [Respondent's Brief, p. 30], did not involve an application for an injunction. In that case the application was by a co-defendant of the bankrupt in a mechanic's lien foreclosure action for leave of the bankruptcy court to bring in the trustee as a party defendant. The liens were against a public improvement and it appeared that there was a fund of $42,000 available for payment to lienors, a substantial part of which the trustee in bankruptcy was confident would be available to him for distribution to general creditors. The Court allowed the joinder of the trustee but on the express condition that the suit be prosecuted "in a forum which is convenient to the trustee,

namely, Kings County," stating that it "would not be practicable" for the trustee to be forced to defend the case in another county of the same state, to wit, Albany County, since the trustee asserted that he was "without funds to enable him to conduct litigation in Albany County." In so far as this case is authority for anything relevant to the present proceeding, it is submitted that it sustains the view of the New Jersey Bankruptcy Court that petitioner, with his $100 of liquid assets, should not be burdened with the defense of a useless litigation in a foreign jurisdiction.

All of the cases above distinguished as being within one or more of the four classes described were lower Federal court cases. None of them ever came before this Court. Indeed, respondent has cited only one case in subdivision 2 of POINT I which was decided by this Court: *Hebert* v. *Crawford,* 228 U. S. 204. That case is distinguishable under each of the first three classes. The State Court suit there sought to be enjoined was brought by a third party to recover a sum of money from a substituted trustee in bankruptcy, which money had been paid to such substituted trustee by the original trustee after having been abstracted by the latter from the treasury of the plaintiff third-party. The sole question presented was whether the substituted trustee had notice, when he received the money, as to its source. The other controversy presented by the *Hebert* case,—as to the title and right of possession to a certain crop of rice—was determined by the bankruptcy court without interference by the State Court and was admittedly not involved in the State Court action sought to be enjoined. No question properly before the bankruptcy court was involved in that State Court action; and while this Court clearly recognized the power of the bankruptcy court to

enjoin interferences with its jurisdiction to determine questions of title to property in its possession, this Court did not there pass upon the question whether such power extends to other situations. It was not called upon to do so by the facts of that case.

Two other cases cited by respondent (in Point III of its brief) require brief comment:

Daniel v. *Guaranty Trust Co.*, 285 U. S. 154, 162 [Respondent's Brief, p. 45] is cited for the proposition that:

> "The act of filing a claim in a bankruptcy court does not give that court jurisdiction over the claimant as to every issue that might possibly arise between claimant and trustee in bankruptcy."

In that case, however, when Guaranty Trust Company filed a reclamation petition as to certain bonds in the possession of the trustee, the trustee filed a counterclaim for moneys allegedly owed by the Trust Company to the bankrupt, such alleged debt apparently having no relation to the subject-matter of the reclamation petition. This Court held that the filing of the reclamation petition did not confer on the referee summary jurisdiction to enter a turnover order against the Trust Company on the debt set up by the trustee in his counterclaim, since that was a matter "having no immediate relation to the claim which it [the Trust Company] had presented" [285 U. S., at 162]. In the instant case, the trustee has not attempted to assert any summary jurisdiction in the bankruptcy court over his affirmative claim to recover the assets of All Continent; but nothing could be a more complete defense to the claim of $417,258.19, filed by All Continent in the bankruptcy court, than the trustee's contention that All Continent is the

alter ego of the bankrupt. No matter could have a more "immediate relation to the claim * * * presented."

The discussion at pages 39-40 of Respondent's Brief indicates that *Southwestern Lumber Co. of New Jersey* v. *Kerr,* 11 F. Supp. 253 (S. D. Tex., 1934), aff'd in 78 F. (2d) 348 (C. C. A. 5th, 1935), might have some relevance to the problem of the present case. An examination of that case, however, indicates that the trustee did not press his objection to the jurisdiction of the equity court but filed a cross-action there and litigated the question on the merits, at the same time taking no proceedings in the bankruptcy court. Respondent quotes the following sentence from page 259 of the District Court's opinion:

> "The foregoing discussion is upon the finding and conclusion that the bankruptcy court and defendant, its trustee, have *neither actual nor constructive possession of the stock.* * * *"

Respondent then quotes the Court's conclusion in the following paragraph that it, and not the bankruptcy court,[6] has jurisdiction to consider the controversy, but omits the intervening sentence which explains why:

> "If it has either [*i.e.,* actual or constructive possession], the bankruptcy court, and not this court, has jurisdiction, unless defendant, by his long delay in proceeding in the bankruptcy court, and by filing his cross-action here, has waived it. * * *"

Nowhere does the Court suggest that the bankruptcy court lacks jurisdiction to enjoin proceedings by adverse

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[6]**The opinion shows (p. 255) that the bankruptcy was pending in the same District Court and the only question, therefore, was whether the same court should hear the case sitting in equity or sitting in bankruptcy.**

claimants in foreign jurisdictions where any of the reasons for such an injunction urged by the petitioner in the present case appear. Indeed, from the next preceding opinion by the same judge in the same case (11 F. Supp. 252), a decision handed down eight months before the decision relied on by respondent, it appears that the court did restrain the adverse claimant, on motion of the trustee, from selling the pledged securities pending a determination of the merits of the controversy, which both the adverse claimant and the trustee thereafter submitted to the equity court. That the jurisdictional question was not pressed is further indicated by the fact that it is not even discussed in the opinion of the Circuit Court of Appeals (78 F. (2d) 348), which was limited to a discussion of the merits of the controversy.

Turning now to petitioner's cases:

If the sole question is one of power, as respondent in the first instance concedes (Brief pp. 2-3), the only authorities needed to sustain petitioner's position are the applicable sections of the Bankruptcy Act and the Judicial Code, cited in petitioner's original brief (pp. 17-18, 20), and the decisions of this Court in *Continental Illinois National Bank & Trust Company* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648, and *Local Loan Co.* v. *Hunt*, 292 U. S. 234, together with the cases in the lower Federal Courts discussed at pages 24-25 of petitioner's original brief. All of these authorities deal with the Bankruptcy Court's power to enjoin the exercise of the rights of adverse claimants.

As for respondent's criticisms of the *Rock Island* case (Respondent's Brief, p. 32):

(a) That case did arise, as petitioner carefully stated in his original brief (p, 18), under Section 77 of the Bank-

ruptcy Act; but this Court found the authority for its injunction in the so-called "omnibus" clause (15) of Section 2 (294 U. S. at 677-678). The obvious and appropriate purpose of this Court's limitation of its decision to cases under Section 77 was to serve notice that this Court did not intend to impair the long-settled rule that a bankruptcy court lacks power to enjoin *pledgees* in ordinary bankruptcies. No limitation upon the broad and general injunctive power of bankruptcy courts, so thoroughly expounded in the *Rock Island* opinion, was expressed, and no such limitation, it is submitted, was intended.

(b) By removing certain language of the opinion from its context, respondent suggests (Brief p. 32) that the *Rock Island* case did not involve an adverse claimant; but it unquestionably did involve a pledgee in possession of pledged securities. The courts have consistently regarded a pledgee in possession as an adverse claimant. See, for example:

In re Bacon, 210 Fed. 129 (C. C. A. 2d, 1913).

In other words, whatever phrase is used to describe the status of the pledgees in the *Rock Island* case, that status was in all respects similar to that of the respondent herein, —they were claimants in possession of property in which the creditors (trustee in our case) claimed an interest, and were attempting to exercise their rights with respect thereto by action outside the Bankruptcy Court. The Court there enjoined that action. The same result is sought here.

(c) By the statement that the debtor had a "property interest" in the pledged securities, respondent apparently

asks this Court to infer that the decision in the *Rock Island* case was based upon the existence of summary jurisdiction in the Bankruptcy Court. The creditors, however, were adverse claimants in possession within the meaning of prior cases, and, therefore, even under Section 77, the Bankruptcy Court had no *summary* jurisdiction. Yet without summary jurisdiction, the Bankruptcy Court had, and exercised, its power to enjoin the pledgees.

If respondent seeks to avoid the force of *Local Loan Co.* v. *Hunt*, 292 U. S. 234, on the ground that the injunction there involved was not issued by a bankruptcy court as such, he must ignore the plain words of the decision itself. In that case this Court said (292 U. S. at p. 241):

> "What has now been said establishes the authority of the bankruptcy court to entertain the present proceeding, determine the effect of the adjudication and order, and enjoin petitioner from its threatened interference therewith."

Respondent's other attempts to distinguish this Court's decision in the *Hunt* case, *supra*, illustrate the very point petitioner urges. There the bankruptcy court had exercised its function and had granted the bankrupt a discharge. The Court's duties had, under ordinary circumstances, been fulfilled and there remained nothing further for it to do. But a situation arose in which "one of the primary purposes of the bankruptcy act" was threatened with being frustrated by the conduct of third persons (292 U. S. at pp. 244, 245). This Court held that the danger, in effect, created the remedy. Like any court of equity, the bankruptcy court was held to have power "to secure or pre-

serve the fruits and advantages of a judgment or decree rendered therein" (292 U. S. at p. 239). If a "judgment or decree" is necessary to establish and maintain the applicability of the *Hunt* case, the decree of adjudication and the orders of the referee are ready to hand. Such, however, need not be relied upon, for the power which this Court found to reside in the bankruptcy court was clearly as broad as the exigencies of the situation required.

In the case now before this Court, interference is clear. It is alleged in the petition upon which the injunction was granted (R. p. 8):

> "16. By means of the institution of its said suit in said Eastern District of Pennsylvania, said All Continent Corporation is endeavoring to hinder, impede, harass, obstruct and prevent the orderly, proper and legal administration of the affairs of this bankrupt estate * * *."

This was not then and is not now controverted by respondent (R. 28-29; Respondent's Brief, pp. 2-3); was found to be the fact by the bankruptcy court (R. 31, 32); was the basis of the injunction which issued (R. 31-32); and is now claimed by respondent to be immaterial (Respondent's Brief, pp. 2-3).

At pages 24-25 of petitioner's original brief, the following cases were discussed:

> *In re Trayna & Cohn,* 195 Fed. 486 (C. C. A. 2d, 1912);
> *In re Perl,* 28 F. (2d) 1002 (W. D. Pa., 1928);
> *In re Hornstein,* 122 Fed. 266 (N. D. N. Y., 1903);

In re Nathan Turim, Inc., 55 F. (2d) 672 (S. D. N. Y., 1931); and
In re Republic Plumbing Supply Corporation, 295 Fed. 573 (E. D. N. Y., 1924).

These cases were cited for the proposition that "the lower courts have often enjoined collateral litigation of bankruptcy controversies outside of the bankruptcy courts, and under a variety of different circumstances." They were cited as applications of the principle enunciated by this Court in *Local Loan Co.* v. *Hunt*, 292 U. S. 234, that a bankruptcy court has power to enjoin external litigations which tend to frustrate the purpose of the Bankruptcy Act. Yet, respondent passes over all of these cases, except *In re Trayna & Cohn*, with the statement that none "involved the question of the bankruptcy court's power to enjoin a suit against a trustee * * *" [Brief, p. 35]. But, each involved a situation in which a question presented to the bankruptcy court in one form or another, relating to property not in the possession of the bankruptcy court, was thereafter presented by a collateral litigation instituted by an adverse claimant, and in each case such adverse claimant was enjoined by the bankruptcy court from further prosecuting such collateral litigation. No better evidence of the applicability of these precedents to the instant case could be sought than respondent's counsel's failure to attempt a distinction in their extremely thorough brief.

A more courageous, but equally futile, effort is made [Respondent's brief, p. 35] to distinguish *In re Trayna & Cohen*. The distinction urged is that in that case the plaintiff in the State Court action had consented to a consideration of title by the bankruptcy court before he attempted to raise the same question in the State Court action. This

attempted distinction further emphasizes the weakness of respondent's position, for it is equally clear in the present case that respondent consented to a consideration by the bankruptcy court of all questions raised by its proof of claim, which it filed before the institution of the Pennsylvania suit (R. 8, 15, 31, 44). There certainly can be no doubt that one of the questions presented by that proof of claim was whether respondent is the *alter ego* of the bankrupt.

POINT II.

THE *DICTA* OF THE CIRCUIT COURT OF APPEALS ARE PROPERLY SUBJECT TO REVIEW IN THIS COURT, QUESTIONS RESPECTING THEM HAVING BEEN PRESENTED BY THE PETITION FOR THE WRIT OF CERTIORARI.

The petition in the present case contained "a summary and short statement of the matter involved" (pp. 2-7) in which one paragraph was devoted to the decision of the Circuit Court of Appeals and one paragraph to the *dicta* of that court. Those paragraphs are set forth at pages 6-7 of the petition. The petition also contained "a short and summary statement of * * * the reasons relied upon for the allowance of the writ"[7] (pp. 8-13). One of the reasons urged for the granting of the writ was that the action of the Circuit Court of Appeals, in prejudging, by *dicta*, questions

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[7]The only requirement of the rules as to the mode of stating the questions in the petition is found in the first sentence of § 2 of General Rule XXXVIII:

> "2. The petition shall contain only a summary and short statement of the matter involved and the reasons relied on for the allowance for the writ."

not before the court, "has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision" (pp. 10-13).

Furthermore, there is no jurisdictional limitation which prevents this Court from considering questions presented by the record, even if not raised by the petition for certiorari, where a decision of the Circuit Court of Appeals is the subject of review.[8] *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, 567-568. *A fortiori*, matters urged in the petition as reasons for granting the writ may be considered, though not stated in an unnecessary part of the petition headed "Questions Presented". *Cf. Olson* v. *United States*, 292 U. S. 246, 262.

Neither the case quoted by respondent (*Helvering* v. *Taylor*, 293 U. S. 507, Brief pp. 18, 57), nor the authority cited in that quotation (*Gunning* v. *Cooley*, 281 U. S. 90), is authority for the petitioner's argument (Brief, pp. 18, 57) that "no consideration should be given to petitioner's Point III." In the *Helvering* case the petitioner stated a broad "question". The respondent argued (see pp. 6-7, 26-27 of his brief) that the petitioner had stated the question unfairly, by making assumptions not supported by the record and unfavorable to respondent. This Court decided that, even accepting petitioner's statement of the question, and the disputed facts incorporated therein, as correct, the petitioner could not prevail. In the *Gunning* case peti-

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[8]A collection of certiorari cases in which this Court has considered questions not raised in the petition is found in *Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States* (1936), § 389, pp. 782-787.

tioner was a physician against whom a verdict for malpractice had been rendered. The petition and supporting brief discussed solely the insufficiency of respondent's proof and alleged error in the trial court's refusal to direct a verdict for petitioner. In petitioner's main brief (pp. 9-12), however, there were sixteen assignments of error, of which eleven related to irregularities in the conduct of the trial not mentioned anywhere in the petition or supporting brief. Such matters this Court properly declined to pass upon.

POINT III.

PETITIONER'S POINTS ARE ADEQUATELY SUPPORTED BY *THIS* RECORD. THE RECORD IN *MATTER OF STEELMAN* IS ESSENTIALLY CORROBORATIVE.

This record shows that All Continent filed its claim in the bankruptcy court (R. 8, 15); that All Continent was scheduled by the bankrupt as a creditor in the bankruptcy court in the sum of $417,258.19 (R. 44, 79); that the trustee has asserted in most unequivocal language that All Continent is the *alter ego* of the bankrupt (R. 45-47, 81-83); that examinations under Section 21(a) of the Bankruptcy Act are and have been pending in which the trustee is investigating the relationship of All Continent to the bankrupt (R. 3, 10, 67); that such examination has been obstructed by All Continent itself (R. 5-6, 12-13); that such examination has further been obstructed by the wife of the bankrupt, herself President of All Continent (R. 3, 6, 10, 13); that the trustee is financially unable to defend the lawsuit instituted in Pennsylvania (R. 8, 15, 79-80).

The only facts mentioned in petitioner's brief which are found *only* in the *Matter of Steelman* record are (a) that a creditor, Capital Company, objected to the All Continent claim on the same grounds which, it appears from this record, the trustee has urged; and (b) that the bookkeeper of All Continent Corporation, Herbert Leitstein, has been cited to the bankruptcy court for contempt of court, upon which citation the bankruptcy court has not yet ruled.

Respectfully submitted,

WM. ELMER BROWN, JR.,
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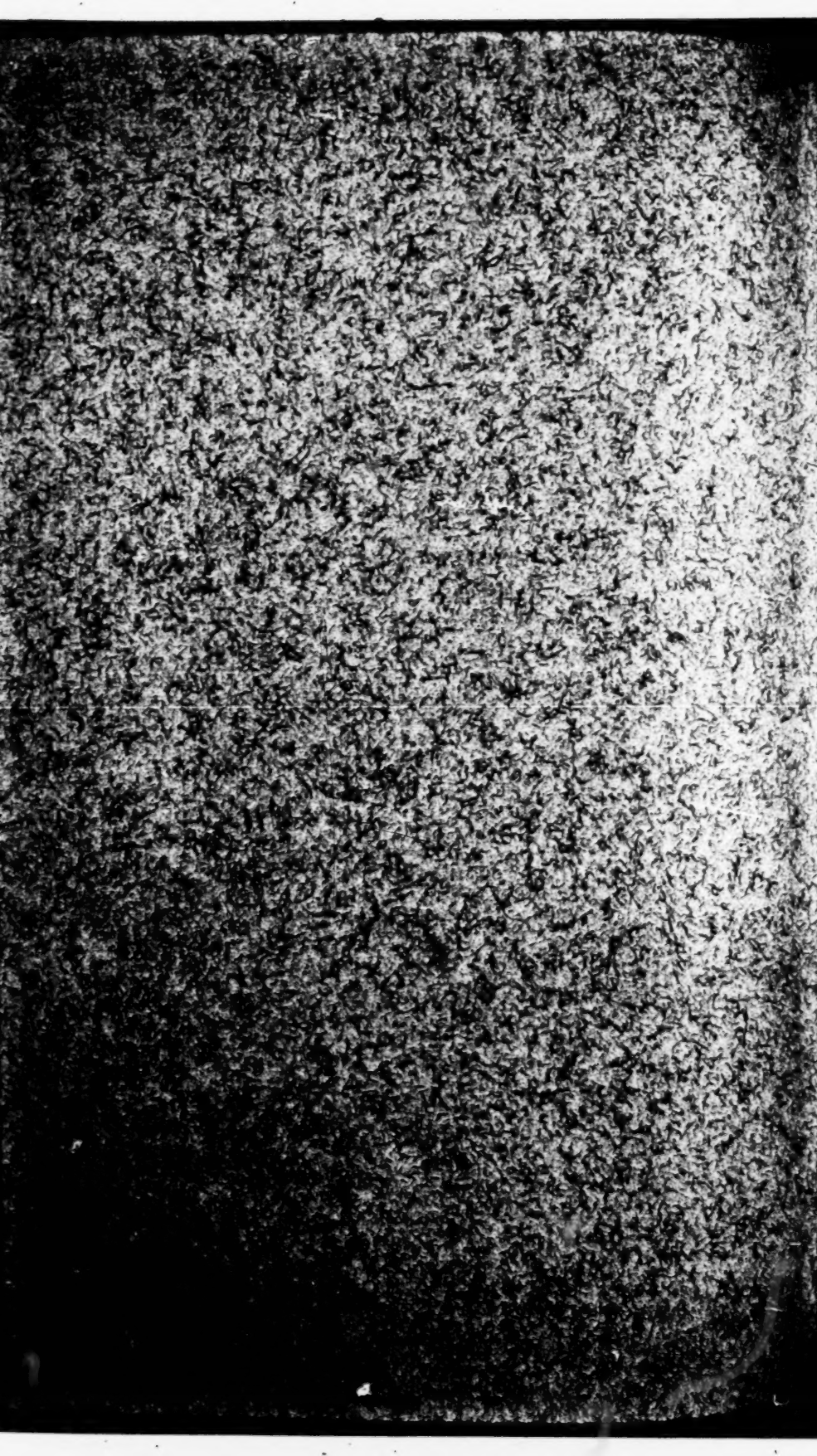
WM. D. WHITNEY,
Counsel for Petitioner.



IN THE

Supreme Court of the United States

October Term, 1936. No. 638.

HIRAM STEELMAN, Trustee in Bankruptcy of WILLIAM FOX, a Bankrupt,
Petitioner,

vs.

ALL CONTINENT CORPORATION,
Respondent.

ANSWER IN OPPOSITION TO PETITION FOR A TEMPORARY RESTRAINING ORDER AND FOR A TEMPORARY INJUNCTION PENDING THE DECISION OF THIS COURT UPON A PETITION FOR A WRIT OF CERTIORARI.

To the Honorable Benjamin N. Cardozo, Associate Justice of the Supreme Court of the United States:

The respondent, All Continent Corporation (hereinafter sometimes referred to as All Continent), answering the petition of Hiram Steelman, trustee in bankruptcy of the estate of William Fox, bankrupt, for the issuance of a temporary restraining order and for a temporary injunction pending the final decision of this Court upon the petition for a writ of certiorari, filed January 11, 1937, alleges as follows:

I. At page 2 of the petition for a temporary restraining order, the petitioner Hiram Steelman annexes as part thereof, the petition for a writ of certiorari and marks the same Exhibit A. Brief comment will be made to demonstrate that the facts alleged in the statement in the said Exhibit A are entirely incomplete and fail to present to this Court a proper, complete and clear narrative of the course of events leading up to the making by the United States Circuit Court of Appeals for the Third Circuit of the order reversing the restraint that had been theretofore imposed by the United States District Court for the District of New Jersey.

If there were before this Court only an application for a temporary stay pending consideration of the application for the writ of certiorari, this answer would be confined to a simple statement that the petitioner will suffer no possible hardship pending decision thereon, and that no temporary relief is required.

In fact, however, this Court has been presented with a voluminous petition, and on the basis of the many averments therein has been asked not to maintain the status quo, but actually to reinstate the order of the District Court. This unusual request, and the unusual charges made in support thereof, warrant a more extended answer.

II. There will be submitted to this Court, together with this answer and memorandum, the following: (A) The transcript of record in the Circuit Court of Appeals for the Third Circuit on the appeal from the order of the United States District Court for the District of New Jersey, marked Exhibit 1; (B) The supplemental record on the same appeal, marked Exhibit 2; and (C) The brief of All Continent as appellant on said appeal, marked Exhibit 3.

III. It is earnestly requested that the Court read the various statements contained in the brief in the Circuit

Court of Appeals submitted by All Continent, for a clear and complete statement of the incorporation of All Continent Corporation in October of 1930, at which time the bankrupt, having created it, intended to set up a trust of the stock of All Continent Corporation for his wife, daughters, and grandchildren. This was within a few months after April 1930 when Mr. Fox had concededly received over $18,000,000, in cash, as a result of a sale made by him of certain holdings which he had at that time.

The value of the assets which constituted the capital of All Continent was approximately one-third of the said sum of $18,000,000, leaving Mr. Fox, after the creation of All Continent with a net worth of over $12,000,000 because, in addition to the $18,000,000 which he secured as the result of the sale in April, 1930, he had other substantial assets. Within one month after the transfer of the aforesaid assets to All Continent in December 1930 and in accordance with the express intent at the time of the creation of All Continent, Mr. Fox, on January 28, 1931, set up by deed of trust dated that day, a trust fund for the members of his family, the corpus of which consisted of all the capital stock of All Continent. The charge that All Continent is the alter ego of William Fox is a pure legal formalism which the petitioner adopts to escape the plain inferences from the time and circumstances under which the transfers were indisputably made to All Continent.

At the time of the creation of All Continent, William Fox was wholly solvent and without creditors.

The lapse of five years and a half between that time and the filing of the petition in bankruptcy belies the petitioner's contentions as to the ownership of the assets of All Continent.

IV. The data referred to in the brief (Exhibit 3) submitted by All Continent to the Circuit Court of Appeals for the Third Circuit, demonstrated, as the Circuit Court of Appeals stated, that the commencement by All Continent

of the suit in the Eastern District of Pennsylvania (hereinafter called Pennsylvania suit), was the only proper procedure that could have been followed by All Continent in view of the plainly concerted efforts of the petitioner and certain creditors to jeopardize, if not in fact destroy, the equity in All Continent's brokerage account with J. W. Sparks & Company, at Philadelphia, Pennsylvania.

V. Much comment is made by the petitioner in his petition for a temporary restraining order, as well as in the petition for a writ of certiorari about the vast amount of liabilities and the negligible amount of assets in the bankrupt estate. Petitioner avoids disclosing the fact that there are substantial assets listed in the schedules in bankruptcy other than the sum of $100 in cash and that the bankrupt has *denied liability*, on concededly valid grounds, as to the bulk of the claims listed against him.

VI. Further comment is made by petitioner that All Continent Corporation's president, the wife of the bankrupt, was cited for contempt by the referee. The failure of Mrs. Fox to continue an examination, under Sec. 21A of the Bankruptcy Act, which had been begun, is the subject matter of a separate and distinct proceeding. When the matter was submitted to the District Court upon the certificate of the referee, it clearly appeared that the failure of the bankrupt's wife to continue her testimony was due to no other reason than her physical and mental inability to continue on the witness stand. Ample medical testimony, clear and unbiased, demonstrated the truth of these facts. An independent physician, appointed by the referee, orally concurred in those facts, until subsequently for some reason unknown, the referee's appointee submitted a contrary affidavit.

VII. A further statement is made that the referee upon the 21A bankruptcy proceedings concluded that the All

Continent books should be turned over to the trustee in bankruptcy because of the identity of All Continent and the bankrupt. Not only was that issue not before the referee, but he was without legal power to make any such determination, except in a plenary suit where proper issues were before a trial court. His final act in directing the turn over of the books of All Continent in a summary manner resulted in the District Court, upon review, limiting and modifying substantially the order of the referee. Feeling aggrieved both by the order of the referee and by the modifying order of the District Court, All Continent has appealed from those determinations and that matter is now sub judice in the Circuit Court of Appeals.

VIII. Contrary to the statement made upon the argument at the oral hearing held in Chambers on January 11, 1937, there has not been the slightest interference with the 21A bankruptcy examinations. *They have now continued almost daily for seven months and it is uncertain if and when these hearings will ever terminate.* During the course of these examinations every page of the books of All Continent has thoroughly been examined by counsel for the creditors and counsel for the petitioner, who have been permitted by the referee to roam at will through these books and records. All Continent merely objected to the right of the petitioner or the creditors of William Fox to have physical possession of these books and to their right to mark in evidence pages of these books which admittedly, did not in any wise refer to transactions with the bankrupt. Petitioner herein has sought to convey an erroneous impression on this score.

IX. The brokerage account which All Continent maintained with J. W. Sparks & Co. consisted of various marketable securities traded in upon the New York Stock Exchange. At the time of the service by the Capital Company of the third party subpoena, the stocks

in that account had a market value of approximately $500,000. as against which there was a debit balance of $300,000. due and owing to the broker. This account was, therefore, very narrowly margined and might, at any time, had the market reacted unfavorably, been wiped out entirely. It was only by reason of the steadily rising market since March of 1936 when the subpoena was served by the Capital Company upon J. W. Sparks & Co., that All Continent's equity in this account was saved. The third party subpoena served by the Capital Company, a copy of which is submitted with the papers of the petitioner, is a most drastic, unprecedented and unusual subpoena. The Capital Company sought to tie up the assets of William Fox by alleging that the holder of any assets belonging to thirty or more individuals and corporations should be considered by the holder as an asset of William Fox and therefore subject to the Capital Company's judgment against William Fox. Naturally any recipient of such subpoena is immediately put at great peril in disposing of any asset for fear that ultimately it might be determined that the debtor in some way had some interest in that asset. *The Capital Company claims a priority as to the assets in the J. W. Sparks' account, adverse and superior to the trustee in bankruptcy, and yet we find that the Capital Company and its counsel make every effort and endeavor to avoid an adjudication in the Pennsylvania suit where the rights of the Trustee in bankruptcy, petitioner herein, might be protected.*

As appears in the brief submitted by All Continent in the Circuit Court of Appeals for the Third Circuit, the commencement of the Pennsylvania suit was the sole means wherein and whereby your respondent could obtain a proper determination of the true ownership of the assets which were in the possession of J. W. Sparks & Company and consisted of marketable securities. This action as appears in the moving papers was commenced on September 8, 1936 more than 4 months after the commencement of the

bankruptcy and after the 21A bankruptcy proceedings had been in session for perhaps thirty or forty continuous days. Apparently the petitioner acting in cooperation with the Capital Company, was content to have the brokerage account of your respondent tied up to such an extent that it would be in constant jeopardy. Under this state of facts, All Continent went into the only court that it could possibly go to, to obtain this determination and protect its assets. The holder of the securities was J. W. Sparks & Company, with principal offices located in Philadelphia, Pa. The assets themselves were located there, and had been located there for a very substantial period prior to the filing of the petition in bankruptcy by William Fox. This was not a case where the assets were specifically transferred to a particular locality for the purpose of subsequently instituting an *in rem* proceeding. There was no bad faith or fraudulent intent of any kind in the maintenance of that account. There is not the slightest ground for suggesting that these assets were placed in Philadelphia, Pa., for any improper purpose. That necessarily disposes of the claim made in the moving papers as well as upon the oral argument, that the commencement of an *in rem* proceeding would permit any party to transfer assets world wide and thereupon to institute *in rem* proceedings in innumerable jurisdictions foreign to the bankruptcy court. It later more fully appears that in the very Chancery suit which the petitioner instituted in the Chancery Court of New Jersey, he procured an injunction restraining any transfer of any of the assets of All Continent Corporation, thus avoiding the very threat which the trustee makes so much of. The said injunction, except as subsequently modified to permit transfers in the ordinary course of business, remains today in full force and effect.

X. All Continent Corporation, having commenced the Pennsylvania suit, petitioner immediately petitioned the District Court, where the bankruptcy was pending, for an

injunction restraining that suit, and in that application, in the trustee definitely stated to the Court that he was unable to defend the Pennsylvania suit and would be unable for many months to elicit the necessary facts and information in the 21A bankruptcy proceedings in order to prepare that defense. Here, if ever, was a complete misrepresentation to the District Court. It was in express reliance upon that statement by the petitioner that the District Court granted the injunction against the prosecution of the Pennsylvania suit. The opinion of the District Court leaves no doubt on that score. Within one week following the order of the District Court for the District of New Jersey, the petitioner commenced in the Chancery Court of the State of New Jersey a plenary suit seeking to have that court declare that All Continent was the alter ego of the bankrupt, and for additional relief. Constant reference is made to the fact that the Chancery suit was instituted with the approval of the United States District Court for the District of New Jersey. This is an obvious half-truth, made in the expectation that this Court will infer that a United States District Judge approved the commencement of that suit. This was not so. A petition was presented to the referee in bankruptcy without the slightest reason being given why the suit should be brought in the Chancery Court of New Jersey. The referee signed the order approving the commencement of that suit. The District Judge never even knew that the case had been started in the Chancery Court. It appears from his own opinion that he thought that any suit that would be started of that kind, would be brought in the bankruptcy court. The district judge did not approve the bringing of the suit in the Chancery Court.

It is apparent from the reading of the Chancery petition that the allegations with reference to All Continent constitute the most substantial, if not the only important part of the bill of complaint. The claims

against the other parties defendant are comparatively inconsequential. This Chancery complaint covered over seventy typewritten pages and it was humanly impossible for that complaint to have been conceived and prepared in such a brief time after the District Court had rendered its decision. It is safe to assume that at the very moment that the petitioner was pleading to the District Court that he would be unable for several months to garner the facts pertinent to a plenary suit, he was at the same moment, actually preparing his own bill of complaint. Simultaneously with the service of that bill of complaint, the petitioner obtained an order to show cause, based upon a long detailed affidavit, directing All Continent to show cause why a receiver should not be appointed of all its assets and in that order to show cause and without any notice whatsoever to All Continent, the petitioner obtained from the Vice-Chancellor, a most sweeping and drastic injunction, restraining All Continent from transacting even the most insignificant matter of business. Considering the fact that All Continent is engaged in many branches of business, it would have been suicidal if that injunction continued unmodified. All Continent subsequently prevailed upon the Chancery Court to modify that restraint by permitting the All Continent Corporation to conduct its affairs "in the ordinary course of business". The various papers submitted by the petitioner fail to include the order to show cause containing the restraining order which was granted by the Chancery Court, appearing at pages 124 to 127 of Exhibit 2, submitted herewith. Petitioner has all the protection necessary to avoid any possibility of secreting or concealing assets which is set forth by him as the principal ground upon which he requests this Court to issue a stay. The Chancery Court's injunction, at present in full force and effect, affords the petitioner complete relief.

XI. The application made for a temporary stay seeks the most drastic relief, if any weight is to be given at all

to the oral statements of petitioner's counsel upon the hearing, in Chamber, before Mr. Justice Cardozo on January 11, 1937. They stated that they seek in effect to have this Court forthwith reinstate the injunction against the maintenance of the Pennsylvania suit, which had been granted by the District Court, and which was subsequently reversed by the Circuit Court of Appeals. This they expect this Court to do without any semblance of a hearing, and without any opportunity to present the true facts to this Court.

XII. What fault is there found with the order of the Circuit Court of Appeals? The order merely reverses the restraint that had been issued by the District Court, a copy of said order of reversal is submitted herewith as Exhibit 4. The legal justification for that reversal will be found in the brief of All Continent in the Circuit Court of Appeals and in the opinion of the said Court. The Circuit Court of Appeals heard the appeal from the order of the United States District Court in the bankruptcy proceedings. The United States Circuit Court of Appeals, was, therefore, just as much a bankruptcy court as was the District Court. The supervisory power of the Circuit Court of Appeals was properly exercised in view of all the circumstances in this case.

Petitioner's main grievance, apparently, is that the opinion of the Circuit Court of Appeals contains several dicta which might be prejudicial to his interests. These alleged dicta will be discussed seriatum. If any charge can be lodged to the effect that the opinion of the Circuit Court of Appeals contains various dicta, the reasons are apparent. The Circuit Court of Appeals saw that the issues raised in the Pennsylvania suit and in the Chancery suit boiled down to the simple question whether the assets of All Continent belonged to William Fox. To avoid the continuous jockeying by various parties from one court to another and to untangle what would otherwise be a

hopeless conflict of jurisdiction, the court, in its general supervisory manner, proceeded to set forth a course of conduct to be pursued as a result of which definite and final determinations could be had as to the issues involved.

(A) The Circuit Court stated that the controversy between the petitioner, trustee in bankruptcy for William Fox and the respondent, All Continent in the New Jersey Chancery suit is a separable controversy which petitioner construes to mean "thereby in effect ruling that such suit is removable to the federal court". This did not constitute any ruling whatsoever. The Circuit Court of Appeals cannot participate in determining whether a cause is removable from a State to a Federal Court. The District Court is to determine, upon proper application, whether or not the cause, having been removed to the Federal Court, should be remanded to the State Court. There is no appeal from any determination of the District Court. This question of separability was urged and carefully argued before the Circuit Court of Appeals in order to demonstrate that the issues in the Chancery suit were identical with the issues in the Pennsylvania suit, and to demonstrate the falsity of the claim made to the District Judge that the trustee was unable to defend for lack of data. If there could be any doubt that the Circuit Court of Appeals was right in stating that there was a separable issue in the Chancery suit, that question was definitely adjudicated by a decision and opinion which has just been handed down (January 8, 1937) by the Chancery Court of the State of New Jersey, which carefully and fully considered this entire matter and concluded without the slightest reference to the opinion of the Circuit Court of Appeals, that the issues were separable and, therefore, that the cause should properly be removed from the Chancery Court of the State of New Jersey to the District Court for the District of New Jersey. The opinion and order of removal in the Chancery Court are submitted herewith and marked Exhibits 5 and 6 respectively. That suit, therefore, is now in the

District Court for the District of New Jersey. Petitioner's claim that the stay issued by the Pennsylvania District Court prevents a motion for remand, is, without merit. There is no time limit on a motion to remand.

(B) Complaint is made that the Circuit Court of Appeals' opinion contained another dictum to the effect that the determination of the Pennsylvania suit would be res adjudicata against All Continent as to all the issues arising between the petitioner and the respondent in the New Jersey Chancery suit, "thereby in effect ruling that if petitioner defends the Pennsylvania suit its result will be res adjudicata against him". The analysis which was made by the Circuit Court of Appeals of the separable controversy in the Chancery suit and the analysis made of the pleadings in the Pennsylvania suit made clear the fact that the issues created in both suits were identical, and a determination in one should be a determination for all times. It is of no consequence that in the Pennsylvania suit $500,000 of the assets of All Continent are involved, whereas in the New Jersey Chancery suit some additional assets are involved. Upon the argument in the District Court of New Jersey when the petitioner sought before Judge Avis to restrain the prosecution of the Pennsylvania suit, the trustee argued vigorously that the issues in the Pennsylvania suit were identical to the issues that would arise in the plenary suit which he would ultimately bring. In the opinion of the District Court Judge Avis arrived at the same conclusion. A determination as to a substantial part of the assets of All Continent, even if it be only as to a part, would raise the same issues as a suit concerning the whole. Now especially, since the Chancery suit has been removed to the federal court by the order of the Vice-Chancellor, and all the issues are in the federal court, what can possibly be the intent and purpose of the petitioner seeking to avoid a trial on the merits, in the court where the case was first instituted,

namely, in the Pennsylvania district court? The whole controversy now before this court seems to be academic since both cases are now docketed on the equity side of federal district courts, within the same Circuit.

(C) The third claimed dictum was that the New Jersey Chancery suit was an improper attempt by the petitioner to oust the Pennsylvania court of its jurisdiction, "thereby in effect ruling that respondent may prevent such suit". How this can possibly be a dictum when the Circuit Court of Appeals was convinced of what is too obvious to require argument, that the petitioner had misled the New Jersey District Court into granting an injunction, to avoid a trial in the Pennsylvania District Court. This Court will note as the Circuit Court of Appeals noted that the petitioner's motion to the Bankruptcy Court was to stay the Pennsylvania suit against all defendants. This the Bankruptcy Court refused but merely stayed the action against the trustee, enabling All Continent to proceed, *in any case,* against the others. All Continent had to be stopped at all hazards, and by every device deprived from its day in Court. The petitioner's petition to the Bankruptcy Court and the subsequent Chancery suit were plain devices to escape a trial of the Pennsylvania suit. These facts were evident upon the face of the record in the Circuit Court of Appeals.

(D) The last alleged dictum complained of is that the Circuit Court of Appeals stated "that upon proper application respondent is entitled to enjoin your petitioner from litigating the controversy elsewhere". It is here that the petitioner fails completely to grasp the meaning of the decision of the Circuit Court of Appeals' opinion which merely stated, "upon proper application" respondent is entitled to proceed unmolested in the Pennsylvania suit. What was proper and where the application should have been made was not determined or referred to in the opinion of the Circuit Court of Appeals. It was re-

spondent's belief at the time it sought the restraining order from the Pennsylvania court, that the proper place to make that application was in the Pennsylvania District Court, in an effort to have that court protect its own jurisdiction. If petitioner feels aggrieved by that order, it is his prerogative to appeal from the restraint issued by the Pennsylvania District Court to the proper forum, namely, the Circuit Court of Appeals. Simultaneously with the appearance of counsel before Mr. Justice Cardozo on January 11, 1937, the petitioner filed and perfected an appeal from the order of Judge Welsh entered in the Pennsylvania suit. No justification appears for the attempt by petitioner to jump from the District Court in Pennsylvania to the Supreme Court, as is evidenced by the companion proceedings now pending before this Court for the issuance of a writ of prohibition and/or a writ of mandamus. It is strange, indeed, that on the one hand the same counsel, who are the attorneys for the Capital Company, now appear as counsel for the petitioner, and contend that the petitioner should not be made to appear in the Pennsylvania suit. The Capital Company claims that as to the assets involved in the Pennsylvania suit the Capital Company has a lien prior to that of the petitioner. The Capital Company in its answer filed in the Pennsylvania suit (submitted herewith and marked Exhibit 7) has specifically alleged that the suit is improper and that the suit must be dismissed for the reason that the petitioner (the trustee) is a proper party defendant and that by the order of the District Court for the District of New Jersey, then in force, All Continent was enjoined from proceeding against the petitioner, and, therefore, all the necessary parties were not before the court. In one breath, therefore, counsel for the Capital Company state that the suit cannot proceed because of the absence of the petitioner and in another breath, it urges upon this Court that the petitioner should not come in. Both contentions cannot be true. All Continent as well as the Capital Company and the Circuit Court of

Appeals are all convinced that the petitioner is a necessary party to the Pennsylvania suit. The answer interposed by J. W. Sparks & Company in that suit leaves no doubt that the cloud originally created by the Capital Company over the assets in the Sparks' account was continued and perpetuated by the petitioner. A copy of the answer of J. W. Sparks & Company appears at pages 127 to 139 of Exhibit 2 submitted herewith.

This Court is requested to examine the citation of authorities appearing in the papers submitted in opposition to petitioner's application for a temporary stay and restraining order on the original proceedings lodged with this court for the issuance of a rule to show cause why a writ of prohibition and mandamus should not issue. Those authorities demonstrate the propriety of the Pennsylvania suit and the justification for the action of the Pennsylvania District Court in issuing its restraining order.

XIII. In his petition, the petitioner claims that he is in default in answering the Pennsylvania suit, having relied upon the injunction secured by him in the United States District Court for the District of New Jersey, and that when the Circuit Court of Appeals had reversed the restraint of the District Court, he, the petitioner was then in default. Nothing could be further from the fact. When the Circuit Court of Appeals reversed and vacated the order of restraint of the court below, request was made by the petitioner for an extension of time in which to answer and since December 1, 1936, the date of the reversal by the Circuit Court of Appeals, three or four extensions of time to answer were requested by petitioner and on each occasion, granted. This regrettable error on the part of the petitioner will doubtless be promptly corrected. No attempt was made by respondent to enter any bill pro confesso against the petitioner. It is apparent, therefore, that the All Continent has acted in good faith, while the petitioner was devising various means of avoiding the trial of

the issues on the merits of which these applications are a part. No further sanction should be given to the petitioner's conduct. It is urged that a careful analysis of the facts will show nothing more than a determined effort by those acting with and through the petitioner to block a trial of the Pennsylvania suit. It is that which the Circuit Court of Appeals tried to stop. The petitioner, ~~trustee~~ party in bankruptcy, has adopted a most anomalous position. If as the Circuit Court of Appeals, in its opinion, correctly stated, it was the duty of the trustee to go in and defend the Pennsylvania action and obtain any assets that might be available and at the same time test the claim of priority made by the Capital Company, then, of course, the trustee should have answered and defended that suit. If, on the other hand, the trustee feels it was not his duty, it is inconceivable upon what grounds he should contend that this court should interfere with the prosecution of that suit. His failure to answer and defend may be deemed an admission that he has no standing or any interest which can be affected in that suit.

As was pointed out upon the oral argument in Chambers, the voluminous set of papers in the various proceedings which petitioner has instituted in this Court were delivered to counsel of record for All Continent less than 48 hours before the argument and this despite the fact that the petitions are sworn to on Friday, January 8, 1937, in Atlantic City, New Jersey, at which time and place all counsel were together attending the bankruptcy hearings under Section 21A of the Bankruptcy Act. At that time, the petitioner was present. The failure to deliver copies of the papers to counsel for All Continent, upon its request for such papers, at that time, leaves no doubt that there was a concerted attempt on the part of the petitioner to afford no opportunity to answer the charges made in the papers. Inadequate time afforded to make reply to these charges, has prevented the submission of opposition papers in in-

tegrated, sharp and concise form, for which the indulgence of this Court is prayed.

XIV. There is not the slightest justification for any temporary relief to be granted to the petitioner. The petitioner should be directed to present its application for a writ of certiorari in the normal manner and to afford respondent adequate time to make answer thereto in the usual manner.

If, however, this Honorable Court deems it proper to grant the temporary restraining order and temporary injunction prayed for in the petitioner's moving papers, it is respectfully submitted that the restraining order and injunction should not be granted without security sufficient to indemnify the All Continent Corporation for any losses or damages which may result to it as a consequence of the continued efforts of the petitioner and certain creditors of the bankrupt to tie up the assets of the All Continent Corporation now in the possession of J. W. Sparks & Co., consisting of a stock brokerage account, on margin, against a substantial debit balance. As the value of the said securities is approximately $500,000.00, it is respectfully urged that a bond in that sum be required.

And your respondent will ever pray.

ALL CONTINENT CORPORATION,

By

BENJAMIN REASS,

Attorney for Respondent.

PEPPER, BODINE, STOKES AND SCHOCH,

Of Counsel.

Dated: January 14, 1937.

EXHIBIT 1.

Transcript of Record in the United States Circuit Court of Appeals for the Third Circuit, No. 6253, October Term, 1936.

EXHIBIT 2.

Supplemental Record in the United States Circuit Court of Appeals for the Third Circuit, No. 6253, October Term, 1936.

EXHIBIT 3.

Brief for Appellant, All Continent Corporation, in the United States Circuit Court of Appeals for the Third Circuit, No. 6253, October Term, 1936.

EXHIBIT 4.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 6253. October Term, 1936.

ALL CONTINENT CORP.,

Appellant,

vs.

HIRAM STEELMAN, Trustee in Bankruptcy of WILLIAM FOX,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF NEW JERSEY.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the order of the said District Court restraining the All Continent Corporation from proceeding with its suit against the Trustee in Bankruptcy of William Fox in the Pennsylvania Court be, and the same is hereby reversed, with costs.

PER CURIAM,
BUFFINGTON,
Circuit Judge.

Philadelphia,
December 1, 1936.
Endorsements—

Order Reversing Order of District Court
Received & Filed Dec. 1, 1936
William P. Rowland, Clerk

EXHIBIT 5.

IN CHANCERY OF NEW JERSEY.

Between

HIRAM STEELMAN, Trustee for WILLIAM FOX, bankrupt, *Complainant*,

and

ALL CONTINENT CORPORATION, WILLIAM FOX, EVA FOX, BELLE FOX, MONA FOX, WILLIAM FOX TAUSZIG and WILLIAM FOX SCHWARTZ, *Defendants*.

On Petition for Removal.

CONCLUSIONS.

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1. Under *Rule 76* of this court, answers are required to be filed within twenty days "after the service day of the subpoena", but *Rule 2* provides that the time so limited may, "for good cause, be extended by order" of the court.

HELD, that a petition for removal of a cause from this court to the federal court, filed within the time limited by an order duly made by this court, extending the time of the defendants to answer, is within time under *Section 72, U. S. C. A.*

2. In determining the question of diversity of citizenship in removal proceedings, the domicile of the corporation is controlling and not that of its individual stockholders.

3. In a suit brought by a trustee in bankruptcy to set aside transactions alleged to have been in fraud of creditors, the bankrupt is not a necessary party where the re-

lief prayed for is against the grantee or transferee and no relief is prayed for against the bankrupt, other than formal prayers for subpoena and answer.

4. In a determination of the jurisdiction of the federal courts and the right to remove causes of action to them, indispensable parties alone are to be considered and the inclusion of a merely proper party will not oust the jurisdiction of the federal court.

5. An indispensable party is one who has such an interest in the subject matter of the controversy that a final decree cannot be rendered between the other parties to the suit without radically or injuriously affecting his interests, or without leaving the controversy in such a situation that a final determination may be inconsistent with equity and good conscience.

6. Where there is a separable controversy between complainant, a resident of this state, and defendant, a resident of another state, such defendant may remove the entire cause.

Mr. William Elmer Brown, Jr., solicitor for Complainant.

Mr. John Milton, solicitor for All Continent Corporation, (Mr. Murray C. Becker, of the New York Bar, of counsel).

Messrs. Bourgeois & Coulomb, solicitors for William Fox.

Messrs. Cole & Cole, solicitors for Eva Fox, Belle Fox and Mona Fox.

Mr. Ralph O. Willgus, solicitor for Milton C. Weisman, Ancillary Receiver of Fox Theatres Corporation.

Messrs. Proskauer, Rose & Paskus (of the New York Bar), solicitors for Chicago Title & Trust Company.

Sooy, *V. C.*

This matter comes before me on a petition by the defendant, All Continent Corporation, for an order removing the cause to the United States District Court.

Counsel for the complainant opposed the removal and says, first, the petition for removal was not filed within the time limited by statute. The bill of complaint was filed October 13, 1936 and subpoena duly served. Defendant's answers, under Rule 76, "shall be filed within twenty days after the service date of the subpoena", but by Rule 2 it is provided, "the time limited in these rules for doing any act may, for good cause, be extended by order, either before or after the expiration of the time".

Under Rule 76 the answers of the defendants were due on or before November 4, 1936 but on October 28, 1936 the court entered an order as follows:

> "Ordered, that the time of the defendants • • • to answer, plead, demur or otherwise move with respect to the bill of complaint, be and the same is hereby extended to and including the 8th day of December, 1936."

The "good cause" for the order was consent of all parties to the extension of time in order that defendants might have opportunity to investigate the facts and law pertinent thereto, in order to determine upon the future procedure with respect to the bill of complaint.

The requirements of *28 U. S. C. A. Sec. 72,* are that the petition for removal be filed in the "State Court at the time or at any time before the defendant is required by the laws of the State or the rule of the State Court in which such suit is brought, to answer," etc.

The petition for removal was filed on December 3, 1936 and was, therefore, before the time the defendant, All Continent Corporation, was required to answer under the rules of this court. The order extending the time was in conformity with the rules and merely made operative Rule 2 in conjunction with Rule 76. Rule 2 must be read in con-

junction with Rule 76 and, taken together, they constitute the time "before the defendant is required by • • • the rule of the State Court • • • to answer".

It is true that Judge Rellstab, in August of 1916, in *Pilgrim v. Aetna Life Insurance Co.*, 234 Fed. 958, decided otherwise, and it is likewise true that at that time that able jurist said:

> "This question has not been passed upon in this judicial circuit."

But since the time of that decision the Circuit Court of Appeals of the 3rd Circuit, in *Bankers Security Corp. v. Insurance Equities Corp.*, 85 Fed. (2nd Series) 856, have held to the contrary and pointed out that:

> "A number of the inferior courts, mostly before the case of *Ayers v. Watson*, 113 U. S. 594—5 S. Ct. 641, 28 L. Ed. 1093, held that the time for filing a petition for removal from the State to the Federal Court could not be extended by stipulation of the parties, but this position does not seem to be in harmony with the declarations of the Supreme Court. These declarations led to the change of the position in the Southern District of New York."

It is true that the *Ayers Case*, cited by the Circuit Court of Appeals, was decided long before that of *Pilgrim v. Aetna Life Insurance Co., supra*, but it is also true that in the latter case there was no review of the then existing authorities.

But it is argued that "what the court said (*Bankers Security Corp.* case) constitued nothing but dicta" and this is probably true, but that court said:

> "We have thought it best to state what we think the law is and indicate what the practice in this court should be."

This court is not advised of any decision in the courts of this State dealing with this question, but I am furnished with an abundance of authorities in support of the rules that the filing of a petition for removal at any time after the time limited for the filing of the answer by the rule of the court is fatal, even though that time be extended by an order of the court, stipulation of the parties or otherwise, as well as of an abundance of authorities in support of the view laid down by the Circuit Court of this district, supra. A great number of these authorities, pro and con, are cited in *54 C. J., p. 307, sec. 207 (2)*.

It is conceded that the rule in the Southern District of New York and in the State of Pennsylvania is that a petition for removal is in time if filed before the expiration of any extension to plead, given by special order of the court, if the order of the court is authorized by the rules thereof. See (for N. Y.) *Gleason v. H. M. Byllesby & Co.*, 290 N. Y. Supp. 436. (*Sup. Ct., special term, New York County, September 20, 1936*), wherein Justice McLaughlin held, in accordance with the decision of the United States Court for the Southern District of New York, that an application for removal is timely if made before an answer is required to be served, whether the time has been extended by the State court, by a State statute or by stipulation of the parties. As to the rule in Pennsylvania, see citations in *Bankers Security Corp. case, supra*.

Being at liberty, insofar as the Court of Chancery is concerned, to adopt the rigid rule of construction of some jurisdictions, or the rule of less rigidity, which it seems to me is more in accord with modern decisions and more nearly accords with a proper interpretation of *Section 29 of the Judicial Code*, my conclusion is that the petition for removal in the instant case was in time.

The next ground of opposition to the petition is that there is no separable controversy between the complainant, a citizen of New Jersey, and the defendant, All Continent Corporation, a corporation of Delaware.

Section 28 of the Judicial Code (28 U. S. C. A. Sec. 71, in providing for removal of causes from state to federal courts, states:

> "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district."

In order to decide the question involved it is necessary to analyze the bill of complaint, the allegations therein and as contained in the petition for removal being decisive as to the separability of the controversy. *Shapiro v. Christian Bahnsen, Inc.*, 117 N. J. Eq. 165, 175 Atl. 145.

The bill of complaint is composed of four counts as causes of action. The first cause of action is dealt with in 46 numbered paragraphs, from 1 to 46 inclusive, wherein (eliminating paragraphs 11 to 15, both inclusive) complainant charges that William Fox, intending to hinder, delay and defraud creditors, formed the All Continent Corporation and transferred all of his assets to it; that the All Continent Corporation is and was merely the alter ego of Fox and that its assets are his and he, being a bankrupt, his trustee is entitled thereto.

Paragraphs 11 to 15 inclusive, in the first cause of action, seek to set aside as fraudulent a trust agreement made by Fox for the benefit of his wife, children and grandchildren, to the end that the trustee in bankruptcy may regain possession of all the corporate stock of the All Continent Corporation, which stock forms the corpus of the trust created by Fox for the benefit of his wife and others.

The remaining causes of action (2, 3 and 4) seek to set aside as fraudulent transfers of property by Fox to Mrs. Fox, Belle Fox and Mona Fox. The prayers for relief are:

> "1. That All Continent Corporation, William Fox, Eva

Fox, Belle Fox, Mona Fox, William Fox Tauszig and William Fox Schwartz, who are the defendants to this suit may answer this bill of complaint and each statement therein made;

2. That the said defendants may make discovery of what property and assets said All Continent Corporation owns and possesses or to which it is entitled, the character and nature thereof, its probable value, and where the same may be found;

3. That said All Continent Corporation may be decreed to be the alter ego of said William Fox and that said All Continent Corporation and said William Fox are one and the same;

4. That all of the assets of said All Continent Corporation may be decreed to be the assets and property of said William Fox;

5. That said All Continent Corporation may be decreed to hold all of the assets and property claimed to be owned by it and standing in its name, in trust for said William Fox, bankrupt, and/or this complainant, Trustee in bankruptcy for said William Fox, bankrupt;

6. That said assignment and transfer of assets and property made by said William Fox to said All Continent Corporation between the dates of December 23rd and 29th, 1930, in the manner hereinbefore set forth, as well as the assignment and transfer of said brokers' credits at or about the same time, may be set aside and held to be fraudulent and declared to be null and void and of no effect as against the creditors of said William Fox and this complainant;

7. That said indenture of trust dated January 28, 1931, may be set aside and held to be fraudulent and declared null and void and of no effect as against the creditors of said William Fox and this complainant;

8. That the sale of the collateral which said Fox deposited with his said note with said All Continent Corporation which sale took place in the month of December, 1935, and by which said All Continent Corporation became possessed of said collateral and thereby claims to be the owner thereof, may be set aside and held to be

fraudulent and declared to be null and void and of no effect as against the creditors of said William Fox and this complainant;

9. That the assignment and transfer of the property and assets enumerated in said agreements dated February 3, 1936, and May 23rd, 1936, may be set aside and held to be fraudulent and declared to be null and void and of no effect as against the creditors of said William Fox and this complainant;

10. That said All Continent Corporation may be enjoined and restrained from selling, assigning, transferring, mortgaging or otherwise disposing of or encumbering said assets and that said injunction and restraint shall date from the time of the filing of this bill of complaint and to remain in full force and effect until the further order of this Court or until the matters and things in issue herein shall be finally determined;

11. That this Court shall appoint a receiver to take and hold in his possession all of the assets of said All Continent Corporation wherever the same may be found and whatever the same may be, to manage, control and preserve the same under the supervision of this Court from the time of the filing of this bill of complaint, or as soon thereafter as his appointment can be made, until the matters and things herein issue can be finally determined;

12. That said defendants, Eva Fox, Belle Fox and Mona Fox, may make discovery concerning any and all property or thing of value which may have heretofore been assigned or transferred by said William Fox to them or either of them;

13. That all the assets and property herein alleged or claimed to have been assigned and transferred by said William Fox to said defendants, Eva Fox, Belle Fox and Mona Fox, may be decreed to be the assets and property of said William Fox;

14. That said Eva Fox, Belle Fox and Mona Fox, either or all of them, may be decreed to hold all of the assets and property claimed to have been assigned and transferred to them by said William Fox as herein alleged, in trust for said William Fox, bankrupt, and/or

this complainant, Trustee in bankruptcy for said William Fox, bankrupt;

15. That the said assignments and transfers of the assets and property of said William Fox to said defendants, Eva Fox, Belle Fox and Mona Fox as hereinbefore set forth may be set aside and held to be fraudulent and declared to be null and void and of no effect as against the creditors of said William Fox and this complaiannt;

16. That said Eva Fox, Belle Fox and Mona Fox may be enjoined and restrained from selling, assigning, transferring, mortgaging or otherwise disposing of or encumbering any of the assets and property so assigned and transferred by said William Fox to them and each of them as hereinbefore set forth and that said injunction and restraint shall date from the time of the filing of this bill of complaint and to remain in full force and effect until the further order of this Court or until the matters and things in issue herein shall be fully determined;

17. That this Court shall appoint a receiver to take and hold in his possession all of the assets and property now in the possession of or claimed to be owned by said defendants, Eva Fox, Belle Fox and Mona Fox, all or either of them, by reason of the alleged assignment and transfer thereof to them by said William Fox as aforesaid, wherever the same may be found or whatever the same may be, to manage, control and preserve the same under the supervision of this Court from the time of the filing of this bill of complaint or as soon thereafter as his appointment can be made, until the matters and things here in issue can be finally determined;

18. That a writ of subpoena may issue commanding said defendants to answer this bill of complaint and to abide by such decree as this court may make in the premises;

19. That this complainant may have such other relief in the premises as this Court may deem just and proper."

An analysis of these prayers discloses, first, that the defendants (naming all) answer; second, discovery. Numbers 3 to 11, both inclusive, but excluding prayer #7, all seek relief with respect to the allegations of the bill of complaint in the first cause of action, and eliminating averments in paragraphs 11 to 15, both inclusive, of the bill of complaint, the question to be determined under the averments of the bill is, did Fox incorporate the All Continent Corporation, constitute that corporation his alter ego, transfer to it his assets, intending thereby to defraud his creditors, and if it is ascertained that he did so do, the appropriate relief will be to recapture these assets for the trustee under prayers 3 to 11, both inclusive, but excluding #7.

If it also be found on final hearing that the trust agreement was fraudulent, as alleged in paragraphs 11 to 15 of the bill of complaint, then that instrument will be set aside under the 7th prayer for relief.

The relief sought by prayers 12 to 17, both inclusive, relate to counts 2 to 4 inclusive, and defendants therein are Mrs. Fox, her daughters and grandchildren, and have absolutely nothing to do with the All Continent Corporation.

It will be observed that, outside of the trust agreement, there is no allegation that Belle Fox or any other defendant, outside of Mr. Fox and the All Continent Corporation, has ever had or now has custody of any of the assets of the All Continent Corporation, or that they or any of them participated in any of the alleged frauds with reference thereto, insofar as the transfer of assets from Fox to the All Continent Corporation is concerned, or insofar as the subsequent disposition of the transferred assets are concerned.

The relief sought against the wife, daughters and grandchildren is recovery of the capital stock of the All Continent Corporation and other assets formerly belonging to Mr. Fox, other than those assets he allegedly, in fraud of creditors, turned over to the All Continent Corporation.

It would seem, therefore, that the bill of complaint is of a two-fold nature (a) recovery from the All Continent Corporation for the benefit of creditors, through complainant as trustee, the assets which Fox transferred to the All Continent Corporation, and (b) recovery of other assets which Fox transferred to the other defendants than the All Continent Corporation.

As to (a), in addition to the fact that there is no allegation that any of the assets of the All Continent Corporation were ever transferred to any other defendant than that corporation, the allegations generally are that Fox, being possessed of stocks, bonds and securities of a value of over $6,000,000., "transferred and conveyed *all* of his said securities of the value aforesaid to All Continent Corporation". The bill then alleges that all of these securities continued to be under the sole control and dominion of Fox, to the exclusion of the All Continent Corporation, but that by virtue of a series of events starting with December 1935 (sale of collateral securing a note) and in February of 1936 and on May 23, 1936 (exhibits B and C) the All Continent Corporation re-captured or took over all of the assets of Fox, so that "said William Fox was divested of all property of every kind and description which was of any importance or value and he was thereby denuded of all the vast wealth" formerly his. It is this "vast wealth" held by the All Continent Corporation which the trustee seeks to recover from the All Continent Corporation.

It is also true that it is alleged that Fox alone was the originator of the entire fraudulent scheme and, while it is said that the other (Fox) defendants had knowledge thereof, no relief is asked of them, excepting as to assets received by them from Fox other than those held by the All Continent Corporation.

The allegation of paragraph 42 is that all of Fox's transactions with the All Continent Corporation "were each and every one of them a part of a general scheme or plan devised and put into effect by said William Fox", in fraud of creditors.

It is quite apparent from the above that the Fox defendants, other than possibly William Fox, are not all necessary parties to the cause of action (a), and that unless William Fox is a necessary party defendant as to this cause of action, the order for removal should be granted.

It is argued that the theory of the bill of complaint is that "the organization of the All Continent Corporation and all of the transactions had with respect to it was part of a scheme or plan to defraud creditors and that all parties are necessary parties".

Of course, the theory of counsel may not control but any party whose rights would be affected by the decree prayed for is a necessary party.

A decree ordering the All Continent Corporation to turn over to the trustee all its assets would not affect the rights of any defendants other than the All Continent Corporation. If these assets were transferred in fraud, as alleged, they never belonged to any one other than Fox and they now belong to his trustee in bankruptcy. Mrs. Fox and the daughters and grandchildren never had any title or interest in these assets and no decree could be made against them with respect thereto.

If the rights of the defendants, other than the All Continent Corporation, are to be affected by a decree it must be one that holds that there was fraud in the transfer of the stock of the All Continent Corporation to Mrs. Fox under the trust agreement and that that agreement, being void, the stock must be re-transferred by Mrs. Fox to the trustee of William Fox. This is a separate transaction, entirely distinct from the transfer from Fox to the All Continent Corporation of his other assets.

The All Continent Corporation was incorporated in October of 1930, the trust agreement was dated January 28, 1931, the transfer of assets from Fox to the All Connent Corporation was made between December 23rd and 29th, 1930. Of course, if fraud is found at the final hearing, so that the court decrees a return of all assets of the

All Continent Corporation, the stock held by Mrs. Fox as trustee will be worthless. But the mere fact that as a stockholder of the All Continent Corporation she will be affected and that she, as such a stockholder, is a resident of New Jersey, does not either make her, as such stockholder, a necessary party, nor does her residence in New Jersey prevent the transfer to the Federal Court. The residence which must be ascertained is the corporate residence and not that of individual stockholders.

The latest decision on this point seems to be *Puerto Rico v. Russell & Co.*, 288 U. S. 476, wherein the court said:

> "For almost a century, in ascertaining whether there is the requisite diversity of citizenship to confer jurisdiction on the federal courts, we have looked to the domicile of a corporation, not that of its individual stockholders, as controlling. *Louisville, C. & C. R. Co. v. Letson*, 2 How. 497; *Rundle v. Delaware & Raritan Canal Co.*, 14 How. 80; *Marshall v. Baltimore & Ohio R. Co.*, 16 How. 314; *Lafayette Insurance Co. v. French*, 18 How. 404; *Covington Drawbridge Co. v. Shepherd*, 20 How. 227; *St. Louis & San Francisco Ry. Co. v. James*, 161 U. S. 545; *Patch v. Wabash R. Co.*, 207 U. S. 227. In its final form this rule of jurisdiction was stated in terms of a 'conclusive presumption' that the stockholders are citizens of the state of the corporate domicile, see *Marshall v. Baltimore & Ohio R. Co.*, supra, 328; *Covington Drawbridge Co. v. Shepherd*, supra, 233; *St. Louis & San Francisco Ry. Co. v. James*, supra, 554, but even those who formulated the rule found its theoretical justification only in the complete legal personalty with which corporations are endowed. Fictitious that personality may be, in the sense that the fact that the corporation is composed of a plurality of individuals themselves legal persons, is disregarded, but 'it is a fiction created by law with intent that it should be acted on as if true'. *Klein v. Board of Supervisors*, 282 U. S. 19, 24. This treatment of the aggregate for other purposes as a person distinct from its members, with capacity to perform all legal acts, made it possible and convenient to treat it so

for purposes of federal jurisdiction as well." (Pages 479, 480.)

But it is said that in *Shapiro v. Christian Bahnsen, Inc., supra,* the court, dealing with "facts identical with the facts herein" held otherwise. The fundamental difference in fact between the two cases is that in the instant case, insofar as the assets of the All Continent Corporation are concerned, complainant seeks the return thereof to him as trustee of Fox from no other defendant than the All Continent Corporation, while in the Bahnsen case that complainant sought "a decree against each for such part only of the funds and securities as each may be found to hold now, or a money decree • • • for such part as they may have disposed of. The complainant seeks to hold all defendants liable for the total amount • • • not necessarily any one of them for the whole, but each for a part thereof", etc., and again the court was dealing with a situation where the individual defendants "transferred such property to *themselves* to hold under a corporate guise" while in the instant case the charge is that the corporation was the alter ego of Fox and no other person.

Is Fox a necessary party, i. e., an indispensable party, by which is meant one who has such an interest in the subject matter of the controversy that a final decree cannot be rendered between the other parties to the suit without radically or injuriously affecting his interest, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience? *Sioux City Terminal R. & W. Co. of N. A.*, 22 C. C. A. 73, 75; 82 Fed. 124, 126. See also *Rogers v. Penebscot Mining Co.* (C. C. A.), 154 Fed. 606.

The only prayer for relief against Fox is that he answer and (2) "that the said defendants may make discovery of what property and assets said All Continent Corporation owns and possesses or to which it is entitled, the character and nature thereof, its probable value, and where the same may be found".

In view of the allegations of the bill to the effect that Fox divested and denuded himself of all of his vast wealth and that the All Continent Corporation is the possessor thereof (excepting the trust assets), the language of the prayer appropriately requires that the All Continent Corporation make discovery of all its property so received and so held, but the prayer for relief with respect to this property is not against Fox but against that corporation. The prayer for discovery is not in aid of establishing the alleged fraud but in aid of an ascertainment from the All Continent Corporation as to its assets received from Fox, and their value. It would seem that the ultimate result of the litigation, if complainant is successful, must be a decree against the All Continent Corporation, requiring the transfer of all its assets to the trustee, and a decree against Mrs. Fox, as trustee, requiring her to transfer to the trustee all the stock of the All Continent Corporation held by her as trustee, but while these dicrees would be predicated upon a finding that Fox created the All Continent Corporation in fraud of creditors and transferred his assets to it for that purpose, and also created the trust in the same manner, yet Fox has no interest in the litigation to be affected by these decrees. The trustee in bankruptcy represents his rights. All the transfers by Fox, either to the corporation or his wife, are good as between Fox and them, and if the trustee gets more than enough assets to pay the creditors, the All Continent Corporation would get the excess on its assets, and the trust would likewise get any excess on the value of its stock.

This seems to be borne out by the case of *Small v. Gilbert*, 56 Fed. 2nd. 616, wherein the court said:

> "In a suit brought by a trustee in bankruptcy to set aside a conveyance alleged to be in fraud of creditors, the bankrupt is not a necessary party; it is assumed that he had no interest to be affected, except that which was represented by his assignee in bankruptcy, who brings the suit. *Huntington v. Saunders*, 120 U. S. 73;

30 L. Ed. 580; *Buffington v. Harvey*, 95 U. S. 99, 24 L. Ed. 381."

In the *Buffington* case, on appeal, the court said:

"The appellant also insists that the original bill was defective for want of parties in not making the bankrupt a party. • • • The bankrupt had no interest to be affected, except what was represented by his assignee in bankruptcy, who brought the suit. As to the bankrupt himself, the conveyance is good; if set aside, it could only benefit his creditors. He could not gain or lose, whichever way it might be decided."

To like effect is *Cox v. Wall*, 99 Fed. 546, affirmed 101 Fed. 403, and reversed on other grounds in *181 U. S. 244*, and *Harding v. Crosby*, C. C. S. D. N. Y., 17 Batchf. 348, Fed. Cas. No. 6050.

In *Benton, Assignee, etc., v. Allen, et al.*, 2 Fed. 448, the court held that the bankrupt was not a necessary party in a suit to declare a deed null and void as a fraudulent transfer, and that

"He might have been used as a witness without making him a party."

And further,

"A decree of nullity against the two Wilders would, by operation of law, vest the estate in these lands in the assignee without any decree of nullity of the deed as against the bankrupt."

The defendants cite as contrary authority *American Surety Company of New York v. Conway*, 222 Fed. 140, wherein the court held that the administrator of a deceased grantor in a conveyance alleged to be fraudulent was a necessary party defendant. In that case the prayer was that one of the defendants be decreed to hold the land in trust for the benefit of the judgment creditor, subject to the lien of its judgment, and that the heirs of the deceased

grantor pay the judgment and account for the rents and profits, and the administrator of the deceased was, of course, a necessary party, particularly in view of the fact that the bill alleged that decedent, during his lifetime, and his heirs thereafter, received to his and their use the rents, etc., as fully, to all intents and purposes, as if the pretended conveyance had not been made, and prayed an accounting. In the instant case, as heretofore noted, no affirmative relief is prayed for against Fox.

Defendants further rely on *In re Vadner*, 259 Fed. 614, and *Casey v. Baker*, 212 Fed. 247, the former being a Nevada case and the latter from the northern district of New York, in each of which cases a trustee intervened after the institution of the suit against the grantor who, after the institution thereof, was adjudicated a bankrupt.

There being a separate and distinct controversy between complainant and defendant, All Continent Corporation, the entire cause must be removed, in pursuance of the prayer of the petition of that cause. *Barney v. Latham*, 103 U. S. 205; *Gainesville v. Brown Investment Co.*, 277 U. S. 54; *Des Moines Elevator v. Underwriters* (C. C. A. 8), 63 Fed. (2d) 103; *Hoffman v. Lynch* (D. C. N. D. Ga.), 23 Fed. (2d) 518.

Determined: January 8, 1937.

EXHIBIT 6.

IN CHANCERY OF NEW JERSEY.

Between:

HIRAM STEELMAN, Trustee for William Fox, a Bankrupt,
Complainant,

and

ALL CONTINENT CORPORATION, WILLIAM FOX, EVA FOX, BELLE FOX, MONA FOX, WILLIAM FOX TAUSZIG, and WILLIAM FOX SCHWARTZ,
Defendants.

On Bill, etc.

On Petition for Removal, &c.

ORDER OF REMOVAL

This matter being opened to the court by JOHN MILTON, Solicitor for the defendant, All Continent Corporation, and it appearing that the said defendant has duly filed its petition for the removal of this cause to the District Court of the United States for the District of New Jersey in due form of law, and that said defendant has also filed its bond in the penal sum of $500.00 with United States Fidelity & Guaranty Company, as surety duly conditioned, in accordance with the statute in such case made and provided, and that said defendant has given the complainant due and legal notice of this application, and it appearing to the court that this is a proper cause for removal to said District Court;

It is on this 8th day of January, 1937,

ORDERED, that the petition and bond of the defendant All Continent Corporation are hereby approved and accepted and that the above entitled cause be removed to the

District Court of the United States for the District of New Jersey, pursuant to the statute of the United States in such case made and provided, and that all other proceedings in this court be stayed.

LUTHER A. CAMPBELL.

C.

Respectfully advised,

W. F. SOOY,
V. C.

EXHIBIT 7.

Answer of Capital Company in the United States District Court for the Eastern District of Pennsylvania, No. 9533, June Term, 1936.

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CHARLES ELMORE CROP
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

No. 638

HIRAM STEELMAN, Trustee in Bankruptcy of WILLIAM FOX, a Bankrupt,

Petitioner,

vs.

ALL CONTINENT CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BENJAMIN REASS,
Attorney for Respondent,
39 Broadway,
New York, New York.

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STATUTES CITED

Bankruptcy Act:

Section 70 (e) (Act of Cong. July 1, 1898, c. 541, Sec. 70 [e], 30 Stat. 566, as amended Act of Cong. Feb. 5, 1903, c. 487, Sec. 16, 32 Stat. 800, 11 U. S C. A. Sec. 110 [e]) 7

Judicial Code:

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AUTHORITY CITED

Remington on Bankruptcy (4th Ed.), Vol. 5:

Section 2331, page 477 9

Section 2336, page 486 9

IN THE

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OCTOBER TERM, 1936

No. 638

HIRAM STEELMAN, Trustee in Bankruptcy of WILLIAM FOX, a Bankrupt,

Petitioner,

vs.

ALL CONTINENT CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I

Statement.

On May 29, 1936, one William Fox was adjudicated a bankrupt in the United States District Court for the District of New Jersey (R. 3). The petitioner herein was appointed Trustee in Bankruptcy and duly qualified as such (R. 3). Prior to the adjudication in the said bankruptcy, and on or about January 30, 1936, respondent, All Continent Corporation, a Delaware corporation, opened a stock brokerage account with J. W. Sparks & Company, in Philadelphia, Pennsylvania (R. 26). The assets contained in this account were at all times owned by respondent (R. 30). The bankrupt never had any interest in

this account or in the shares of stock which were in this account (R. 30). Furthermore, the bankrupt has no interest in the capital stock of the respondent and has had no interest since January 28, 1931 (R. 79), at which time he created a trust, by deed of trust dated that day, for the members of his family, the corpus of which consisted of all the capital stock of the respondent (R. 79-87).

Prior to the said adjudication in bankruptcy and on March 27, 1936, the Capital Company, a judgment-creditor of William Fox, served a third party subpoena in proceedings supplementary to judgment, as a judgment-creditor of William Fox, upon J. W. Sparks & Company, enjoining and restraining the said brokers from transferring any property of William Fox, judgment-debtor (R. 27), held in the name of William Fox or in the name of many other persons including respondent (R. 35). Thereafter, respondent, in the regular course of its business, ordered J. W. Sparks & Company to deliver the securities to it (R. 30). J. W. Sparks & Company refused to comply with this order (R. 30), contending that the claims made by the Capital Company and by the petitioner placed the said brokers in jeopardy if it should be determined ultimately that the stock was the property of the bankrupt and not of respondent (R. 30, 132). Thereafter, on September 8, 1936, the respondent instituted a suit in the United States District Court for the Eastern District of Pennsylvania (hereinafter called the "Pennsylvania suit"), pursuant to Section 57 of the Judicial Code (Act of Cong. Mar. 8, 1875, c. 137, Sec. 8, 18 Stat. 472, 28 U. S. C. A. Sec. 118), to remove a cloud upon the title to the shares of stock, then in the possession of J. W. Sparks & Company, within said district (R. 23-36). Respondent joined the Capital Company as a party defendant because it was the third party subpoena obtained and served by the Capital Company which created the cloud upon the title of the securities (R. 27). The respondent also joined the petitioner because the petitioner joined with counsel for the Capital Company in opposing an application made to

the bankruptcy court which was designed to put an end to the proceedings by which the Capital Company originally had created the cloud (R. 29, 30). The answer of J. W. Sparks & Company in the Pennsylvania suit admits that the petitioner's acts have continued and perpetuated the aforesaid cloud upon the title to the securities, and in view of their debit balance amounting to over $300,000 J. W. Sparks & Company joined with the respondent in praying that the interests of all the parties in the Pennsylvania suit be determined and adjudicated expeditiously (R. 132, 134, 135).

On that day, September 8, 1936, the United States District Court for the Eastern District of Pennsylvania ordered that a subpoena issue and that the petitioner answer, plead or demur to the bill of complaint within twenty days (R. 37, 38). On September 9, 1936, the aforesaid subpoena was served upon petitioner (R. 18). On September 18, 1936, petitioner was served with a copy of the order to plead entered in the Pennsylvania suit (R. 18). On September 22, 1936, petitioner petitioned the bankruptcy court (R. 3-38) to enjoin the respondent from further prosecuting the Pennsylvania suit as against all the defendants therein, on the ground that the respondent in the Pennsylvania suit is endeavoring

> "to force the trial of the issue of the ownership of property standing in its name concerning the real, true and bona fide ownership of which examination and investigation is now being made in orderly procedure under said Section 21-a of said Bankruptcy Act, by virtue of permission and leave granted by said order entered in this cause as aforesaid. To permit said All Continent Corporation to proceed with said litigation before said investigation and examination under Section 21-a of said Bankruptcy Act is concluded would require petitioner herein to enter upon the trial of the question of the ownership of the property and assets mentioned in said bill of complaint, a copy of which is attached hereto, without such knowledge and information as might be gleaned from the orderly continuance of

said 21-a examination and a complete examination and audit of the books of All Continent Corporation" (R. 9, 10).

On October 7, 1936, the bankruptcy court entered an order holding that petitioner was improperly made a defendant in said Pennsylvania suit, and "that the prosecution of said suit against said Trustee would interfere materially with the proper and orderly administration of the affairs of this bankrupt estate" (R. 45), and enjoined and restrained respondent from further prosecuting said Pennsylvania suit against the petitioner (R. 44, 45).

By order dated October 13, 1936, the Referee in Bankruptcy, upon petition of petitioner, authorized the commencement of a plenary suit in the Chancery Court of New Jersey (R. 53), to try the same issue which the petitioner had urged could not be tried without the completion of the 21-a examination. In this Chancery suit neither the Capital Company nor J. W. Sparks & Company are parties defendant (R. 75).

On appeal duly taken, the Circuit Court of Appeals for the Third Circuit unanimously reversed the order of the District Court holding that the District Court was without power to enjoin the Pennsylvania suit (R. 147), and that in any event the Pennsylvania suit did not interfere with the administration of the bankrupt estate (R. 145).

II

Question Presented.

The petition presents the question whether a court of bankruptcy has the power to, or should, enjoin the prosecution of a suit in equity, instituted pursuant to Section 57 of the Judicial Code (Act of Cong., Mar. 8, 1875, c. 137, Sec. 8, 18 Stat. 472; 28 U. S. C. A., Sec. 118) as against a trustee in bankruptcy and others, in a United

States District Court in which district the property involved is physically located and which property is not in the actual or constructive possession of the trustee or the bankruptcy court and when no affirmative relief is requested against the trustee.

III

ARGUMENT

POINT I

THE PENNSYLVANIA SUIT DOES NOT IN ANY WAY IMPAIR OR DEFEAT THE JURISDICTION OF THE BANKRUPTCY COURT.

1. The suit does not seek to reach or interfere with assets in the bankruptcy court.

The assets in question are not in the *actual* possession of the bankruptcy court. They are the assets of the respondent in the hands of its brokers, physically located in the Eastern District of Pennsylvania (R. 130). The account was created by respondent pursuant to duly authorized agreements executed by respondent (R. 135-139) and the assets in said account were accepted by the brokers as the property of the respondent (R. 130, 131).

Nor are the assets in the *constructive* possession of the bankruptcy court (*Taubel, etc., Co.* v. *Fox*, 264 U. S. 426, 432, 433, 438). The respondent has at all times asserted its claim to these assets which is adverse to any claim of the bankrupt or the petitioner. The petitioner, to reach these assets, must do so by a plenary suit (*Harrison* v. *Chamberlin*, 271 U. S. 191). This must be deemed admitted by the petitioner in view of the commencement of such a suit in the Chancery Court immediately after the issuance of the injunction by the bankruptcy court.

2. The Pennsylvania suit does not otherwise hinder or embarrass the petitioner in the orderly performance of his duties.

The sole claim of petitioner when before the bankruptcy court was that the Pennsylvania suit somehow embarrasses petitioner in the proper performance of his duties. It will be noted that the Pennsylvania suit seeks no affirmative relief against petitioner, nor any decree as to property actually or constructively in his hands.

The petitioner's petition to the bankruptcy court averred that petitioner would be unable to proceed with a plenary suit until the conclusion of the 21-a examination then pending. Within a few days after the bankruptcy court enjoined prosecution of the Pennsylvania suit, petitioner filed his bill of complaint in the Chancery Court of New Jersey, although the 21-a proceedings had not yet been concluded.

Petitioner, in said petition, also averred that the respondent was attempting to try the same issue as would necessarily be tried after he obtained the necessary information in the 21-a examinations (R. 9, 10). His bill of complaint in the Chancery Court sets forth the identical issue, to-wit, whether or not the assets of the respondent are the assets of the bankrupt estate, or whether they are the assets of the respondent free from all claims of the petitioner. The Circuit Court of Appeals, in its opinion, reached this conclusion (R. 146). Likewise, the Vice-Chancellor in the Chancery Court of New Jersey, on the petition for removal to the Federal Court, reached the same conclusion as to the nature of the issue in the Chancery bill of complaint (see respondent's answer in opposition to the petition for a temporary restraining order and temporary injunction, pp. 24-36).

POINT II

THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DID ACQUIRE EXCLUSIVE JURISDICTION OVER THE CONTROVERSY BEFORE IT.

Certificates of stock are property within the meaning of Section 57 of the Judicial Code, and constitute the *res* in the jurisdiction where the certificates are located (*Franz* v. *Franz*, 15 F. [2d] 797, certiorari denied 273 U. S. 756). Where suits are instituted seeking similar or different relief, involving similar or different issues, but affecting the same *res*, the jurisdiction of the court in which the action was first brought is paramount to that of any other court (*Penn General Casualty Co.* v. *Pennsylvania*, 294 U. S. 189, 197; *Farmers Loan and Trust Co.* v. *Lake Street Elevated Railroad Co.*, 177 U. S. 51, 61).

The bankruptcy court does not have exclusive jurisdiction over assets which petitioner claims belong to the bankrupt estate, as such assets are in the actual possession of an adverse claimant and not in the actual or constructive possession of the petitioner or the bankruptcy court (*Kerr* v. *Southwestern Lumber Co. of New Jersey* [C. C. A. 5], 78 F. [2d] 348, certiorari denied, 296 U. S. 611; for a more complete analysis see opinion in this case by the District Court, 11 F. Supp. 253, 256-259). Nor did the bankruptcy court ever acquire jurisdiction over the issue of the ownership of the assets of the respondent. Were this not so, the suit in the Chancery Court of New Jersey would never have been commenced by the petitioner. This latter suit is his admission that that issue was not before the bankruptcy court.

Furthermore, as petitioner was required to bring a plenary suit under Section 70 (e) of the Bankruptcy Act (Act of Cong. July 1, 1898, c. 541, Sec. 70 [e], 30 Stat. 566, as amended Act of Cong. Feb. 5, 1903, c. 487, Sec. 16, 32 Stat. 800, 11 U. S. C. A. Sec. 110 [e]) to test the

claimed right or title to the property, resort must be had to the court having jurisdiction and possession of the *res*. This the Pennsylvania District Court had since September 8, 1936. Therefore, the bankruptcy court was without jurisdiction, exclusive or concurrent, as to the assets involved in the Pennsylvania suit (*Boyle* v. *Gray*, 28 F. [2d] 7, 16, certiorari denied 278 U. S. 653) and had no power to enjoin the prosecution of the Pennsylvania suit.

In addition, J. W. Sparks & Company's debit balance on the securities involved in the Pennsylvania suit is endangered because of the nature of the assets securing said debit balance. Therefore the defendants J. W. Sparks & Company in their answer also prayed for a determination of the interests of the Capital Company, the petitioner, and the respondent.

The petitioner states (at p. 22 of the brief in support of petition) that only in case the Capital Company is successful in the Pennsylvania suit will the petitioner become involved in a controversy with the Capital Company over the enforcement of an alleged lien of the Capital Company against the *res* which is subject to the control of the Pennsylvania District Court. This, no doubt, would be a circuitous method of reaching a result which can readily be attained in the Pennsylvania District Court. As the Capital Company's claim is independent of and adverse to any claim of petitioner and both the petitioner's and Capital Company's claims are adverse to the respondent, and all the aforementioned parties and the *res* are before the Pennsylvania District Court, it is in that court only that a full determination of the title to these assets can be achieved.

POINT III

THE PETITIONER IS A PROPER PARTY DEFENDANT IN THE PENNSYLVANIA SUIT.

As the *res* is not within the control of the bankruptcy court, and another court has jurisdiction over it, the respondent properly joined the petitioner as a party defendant to cut off his rights (*Remington on Bankruptcy* [4th Ed.], Vol. 5, Sec. 2331, p. 477), and leave of the bankruptcy court is not requisite before joining the petitioner as a party defendant where affirmative relief is not asked for against him (*Remington on Bankruptcy* [4th Ed.], Vol. 5, Sec. 2336, p. 486; *In re Smith* [S. D. N. Y.], 121 Fed. 1014; *Duncan* v. *Fox* [S. D. Fla.], 300 Fed. 165; *Massachusetts Mutual Life Insurance Co.* v. *Grossman* [S. D. N. Y.], 4 F. Supp. 990). These cases determine that where the property in question is not in the possession of the bankruptcy court and the suit cannot mature into any charge on the assets of the bankrupt estate, being only an invitation to come in and get more assets if the trustee be entitled thereto, leave of the bankruptcy court to make the trustee a party defendant is unnecessary. Since leave is not necessary, the bankruptcy court is without power to restrain the joinder of the petitioner as a party defendant. The Pennsylvania suit is clearly not an attempt to deprive the bankrupt estate of assets. It merely extends to the petitioner an invitation to establish his right to assets.

POINT IV

DICTA CANNOT BE PREJUDICIAL.

Expressions found in the opinion of the Circuit Court of Appeals, which are claimed by petitioner to be beyond the points involved, do not come within the rule of *stare decisis* (*Humphrey's Executor* v. *United States*, 295 U. S. 602, 626) and are not permitted to control the judgment in subsequent suits (*Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 291). Therefore, the dicta, if any be found, cannot be prejudicial to the petitioner.

Respectfully submitted,

BENJAMIN REASS,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936. No. 638.

HIRAM STEELMAN, Trustee in Bankruptcy of WILLIAM FOX, a Bankrupt,

Petitioner,

vs.

ALL CONTINENT CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT

BENJAMIN REASS,
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IN THE

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OCTOBER TERM, 1936. No. 638.

HIRAM STEELMAN, Trustee in Bankruptcy of WILLIAM FOX, a Bankrupt,
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vs.

ALL CONTINENT CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF OF RESPONDENT

Opinions of Courts Below.

The opinion of the Circuit Court of Appeals, Third Circuit, appears at R. 101-106, and is officially reported in 86 F. (2d) 913. The opinion of the United States District Court for New Jersey appears at R. 29-31 and is officially reported in 16 F. Supp. 949.

Question Presented.

The petition for writ of certiorari granted herein on February 15, 1937, presents the following question:

"The question is whether a court of bankruptcy has power to enjoin a creditor from prosecuting, as against

the trustee, a suit, under Section 57 of the Judicial Code (Act of Cong., Mar. 8, 1875, c. 137, § 8, 18 Stat. 472; R. S. §§ 738, 742; 28 U. S. C. A. § 118) brought subsequent to the adjudication, in a foreign jurisdiction, where the bankruptcy court determines (1) that the trustee was improperly made a party to such suit and (2) that prosecution of said suit against the trustee would constitute an interference with the orderly administration of the bankrupt estate."

Statement of the Case.

Preliminary Statement.

Respondent is willing to stand or fall in this proceeding solely on the question of the lack of power of the bankruptcy court to make the original injunction order (R. 31). Upon petitioner's application to the bankruptcy court (R. 2), respondent submitted no answer but relied entirely upon a motion to dismiss the petition (R. 28). Respondent did not appeal to the discretion of the bankruptcy court for a denial of the petition (R. 2) by facts in its possession which could have been presented by answer to negative petitioner's factual contentions.

Petitioner, in his petition (R. 2), unwilling to rely upon facts pertinent to his application, endeavoring to build up an atmosphere prejudicial to respondent, freely indulged in misstatements of fact and half truths.

In petitioner's brief in this court he still pursues the same tactics. Since respondent's motion to dismiss (R. 28) did not raise the question of the bankruptcy court's discretion, the practice adopted by petitioner in his brief, of arguing and presenting the question of the proper exercise of the bankruptcy court's discretion, could have been intended for no other purpose than to enable him to develop in his brief a series of factual incidents which

are wholly extraneous to the question presented upon this certiorari.

If petitioner can succeed in convincing this Court, upon the record before it, that the bankruptcy court had the power to enjoin the prosecution of respondent's Pennsylvania suit, he is clearly entitled to a reversal of the decree under review. Nothing short of that, however, will suffice. No question of discretionary power is involved in this certiorari.

Throughout petitioner's brief there is strained and tortured effort to have it appear that his controversy with respondent, under review by this Court, arises, from a "conspiracy" in which respondent participated, from a "scheme" of respondent, by respondent's having "taken advantage" of petitioner, and by respondent having been guilty of "establishing a technique" • • • "to harass and delay creditors". Petitioner's approach to a single question of law is vicious, not only because of the unjustified attack made upon respondent, but also because petitioner's supporting facts are not found in the transcript of record nor in any record of which this Court may take judicial notice. Respondent declines to offend the dignity of this Court by indulging in this improper practice and will confine itself to the question of law here presented.

Respondent, at pages 12-17, infra, severely criticizes petitioner's including, in his brief, reference to facts not contained in the record before this Court or before either of the courts below. It is evident that petitioner's practice was conceived solely to create an atmosphere hostile to respondent. For the same reason, petitioner includes Point II of his brief, which discusses a question *never raised or suggested by the record*, conceived solely to divert this Court's attention from the real issue.

Statement of the Case.

Because of petitioner's practice in having included in his "Statement of the Case" alleged facts having no bearing on the issue before this Court and as indicated, not appearing in the transcript of the record, it is necessary for respondent briefly to restate those facts which appear in the record before this Court which are pertinent to the sole issue here presented.

On January 7, 1936, respondent opened a marginal security trading account with the firm of J. W. Sparks & Co. of Philadelphia, Pa. (R. 96-99). Substantial amounts of stock owned and controlled exclusively by respondent (R. 22, 94-95) were placed to the credit of this account in Philadelphia, Pa. (R. 19, 92). Although J. W. Sparks & Co. maintained a branch office in the City of New York, N. Y. (R. 24), respondent's account had been opened in Philadelphia, Pa. (R. 19, 92), where respondent's securities were at all times maintained (R. 19, 92). Nowhere does petitioner contend that the bankrupt ever had possession of any of the securities in this account.

On March 27, 1936, the Capital Company, pursuing a judgment which it obtained in the District Court for the Southern District of New York in July, 1935 (R. 19), caused a subpoena in proceedings supplementary to judgment to be served upon the brokerage firm of J. W. Sparks & Co. as a "third party" (R. 20), which subpoena contained a provision pursuant to § 781 of the Civil Practice Act of the State of New York (Laws of New York, 1935, Ch. 630, § 1, p. 1270), which provided that the said third party is forbidden to transfer property belonging to the judgment-debtor until further order of the court (R. 20, 24-26). It further provided that anyone who violates "the provisions of such restraining provision shall be subject to punishment by the court by fine or imprison-

ment, or either, as and for a contempt" (R. 20, 24-26). This subpoena upon which this injunction provision was endorsed ordered the said J. W. Sparks & Co. to appear and be examined

> "concerning properties or monies of William Fox, judgment-debtor, in your possession now or at any time since January, 1929, held either in his name or in the name of • • • All Continent Corporation [and more than twenty other persons]" (R. 25).

The form of this subpoena is without precedent in the history of proceedings supplementary to judgment, in the State of New York. The attempt to compel J. W. Sparks & Co. to be examined concerning property of the judgment-debtor standing in his name "or in the name of All Continent Corporation", combined with the injunction which prevented J. W. Sparks & Co. from transferring any assets of the judgment-debtor William Fox, served only to give notice to J. W. Sparks & Co. that some claim was being made by Capital Company, the judgment-creditor, that these assets in the hands of J. W. Sparks & Co., although standing in the respondent's name and apparently the respondent's exclusive property, may in fact be the property of the judgment-debtor. The sole purpose of Capital Company in serving the subpoena in the form which it adopted was to prevent respondent from properly dealing with its own assets in the ordinary course of its business, in the hope that it could thereby tie up those assets long enough to enable it to obtain a binding adjudication in some forum decreeing that the assets actually belong to William Fox and not to respondent. Having adopted this ingenious procedure, it ill becomes Capital Company, or petitioner, who now seeks to avail himself of the Capital Company's action, to criticize respondent for any action which it took to relieve itself from an unjustifiable attack upon title to

its assets. While respondent would clearly have the right to take such action in any case, its right ripens into a duty for immediate action, when we have in mind that its failure to act promptly might have resulted in its losing, in its entirety, this valuable asset, having an equity at that time in excess of $200,000 (R. 19, 94).

J. W. Sparks & Co., upon service of the subpoena, promptly moved to vacate it in an effort to clarify the meaning and scope of the subpoena (R. 20). Ultimately, the Circuit Court of Appeals for the Second Circuit decided that the injunctive provision of § 781 of the Civil Practice Act of the State of New York was valid, but that it merely "measures the extent of the prohibition by the judgment-debtor's ownership of the property; the 'third party' is forbidden to transfer only what property he [the judgment-debtor] owns, and cannot be punished without proof that any property thereafter transferred was the debtor's in fact" (R. 21; *Capital Co.* v. *Fox* [C. C. A. 2, 1936], 85 F. [2d] 97, 101).

As a result, J. W. Sparks & Co., under pain of punishment for contempt, refused to transfer any of the assets of the brokerage account when requested to do so on behalf of respondent, and prohibited respondent from carrying on its ordinary business (R. 22, 93, 94).

Petitioner states in a footnote, page 6 of his brief, that "the validity of the subpoena was upheld by the Circuit Court of Appeals, for the Second Circuit, in *Capital Co.* v. *Fox*, 85 F. (2d) 97". He fails to state that this decision did not attempt to determine the true ownership of the assets of respondent. In fact, in the opinion of Judge LEARNED HAND, he said:

> "The next objection is that § 781 of the Civil Practice Act is unconstitutional in imposing an injunction without a judge's order. If the statute affected to declare in advance of a hearing that the plaintiff's attorney might forbid the 'third party's' trans-

> fer of any specific property under pain of contempt, there would indeed be much to say for that argument. It does not do so; it measures the extent of the prohibition by the judgment debtor's ownership of the property; the 'third party' is forbidden to transfer only what property he owns, and cannot be punished without proof that any property thereafter transferred was the debtor's in fact. The statute therefore does no more than declare it unlawful to transfer a judgment debtor's property after notice and impose the penalty of contempt for disobediance. It anticipates no judicial decision; it merely creates a new class of unlawful acts, as statutes have done from time immemorial. We are not to be deceived by the fact that the command of the statute is called an injunction, or that it is punished by a court, not by trial with jury" (R. 21; *Capital Co.* v. *Fox,* 85 F. [2d] 97, 101).

Respondent stood by, awaiting the outcome of the proceedings instituted by J. W. Sparks & Co. At the conclusion of those proceedings in August, 1936 (R. 20), respondent still found itself in the same precarious position. It still had a security margin account which secured a debit balance in excess of $300,000 (R. 94) and had an equity value of more than $200,000 (R. 19). If the stock market broke at any time and a demand for further margin were made on respondent, it would have been unable to protect itself by selling securities in the account in order to cover its position. On the other hand, J. W. Sparks & Co. could not and would not permit respondent to deal with this account (R. 22, 95) because J. W. Sparks & Co. could not assume the responsibility of determining if Capital Company or petitioner might later succeed in proving some claim to the ownership of these assets (R. 95).

The statement contained at page 29 of petitioner's brief to the effect that respondent's assets contained in

the account with J. W. Sparks & Co. constituted only a "small fraction of its assets" is unjustified by anything within or outside of the record. The fact is that this account is one of respondent's most substantial assets.

Thus respondent's account with J. W. Sparks & Co. has, for one year, been put and kept in peril, at the mercy of the winds, solely through the conduct of Capital Company and petitioner (R. 94) without a single act of respondent's contributing to that situation or to the situation that now brings respondent before this Court. It was only by reason of the fortunate circumstance of a steadily rising security market since March of 1936, when the subpoena was served by the Capital Company upon J. W. Sparks & Co. (R. 20), that respondent's equity has been saved.

Shortly after the commencement of the bankruptcy proceedings and in the months of June and July, 1936, the bankrupt, who was still being pursued by creditors in various jurisdictions in spite of the bankruptcy proceedings, sought to confine the many proceedings against him, within the bankruptcy court. An application was therefore made in the bankruptcy court to restrain these proceedings, including the proceedings in which the subpoena had been served upon J. W. Sparks & Co. (R. 21-22, 94). When that application came on for hearing before the bankruptcy court, the petitioner joined with Capital Company in opposing same, and the application was denied (R. 21-22, 94). The Sparks account continued to be tied up. Petitioner's participation in that proceeding is evidenced by the order entered therein, dated July 7, 1936.

While the account with J. W. Sparks & Co. remained in jeopardy, no attempt was made by petitioner to litigate the issue as to his right to the account, nor did the Capital Company institute or suggest any such proceedings. In fact petitioner and Capital Company were

apparently content to tie up that account and prevent respondent from functioning in the normal course of its business.

Thus the act of the Capital Company, in serving this unusual subpoena (R. 20, 24-26) and the act of the petitioner joining in the request for a continuance thereof (R. 21-22), created a cloud upon the title to the assets in this brokerage account. Under these circumstances there was no forum to which respondent could go for the purpose of getting an adjudication upon its rights, other than the United States District Court for the Eastern District of Pennsylvania. The *res*, the stocks constituting the assets in the account, were located in the City of Philadelphia, within the jurisdiction of the United States District Court for the Eastern District of Pennsylvania (R. 19, 92). All the rights of the parties, whose acts had created this uncertainty and this cloud, could be adjudicated in the United States District Court for the Eastern District of Pennsylvania. It was impossible to get any adjudication in New York as suggested by counsel for the petitioner because there existed no basis, either *in rem* or *in personam*, upon which the petitioner, a citizen and resident of the State of New Jersey (R. 18), could have been brought in and effectively made a party to such a suit. In New Jersey, likewise no proper adjudication could be had because neither Capital Company, a corporation organized and existing under the laws of the State of California, a citizen and resident of California (R. 18), nor the stock itself was in that jurisdiction. This action, hereinafter referred to as the Pennsylvania suit, was commenced on September 8, 1936 (R. 31), in the only forum in which an *in rem* action could be brought against non-resident defendants.

In accordance with the express provisions of § 57 of the Judicial Code (Act of Cong., Mar. 3, 1911, c. 231, § 57, 36 Stat. 1102; 28 U. S. C. A., § 118), authorizing the par-

ticular proceeding which was instituted, due service was effected not only upon the resident J. W. Sparks & Co., but upon the non-resident defendants Capital Company, a California corporation (R. 100), and petitioner (R. 6, 7). Immediately upon the institution of this action, these defendants, acting together, attempted to thwart every effort to obtain a prompt and final adjudication of the dispute that had arisen solely through their conduct (R. 2, 100). In the first place, petitioner by a petition concealing the true facts went to the bankruptcy court and there sought an injunction restraining respondent from proceeding with the Pennsylvania suit (R. 2). His affidavit is dated September 21, 1936 (R. 16). The petitioner's petition (R. 2) recites that proceedings instituted pursuant to § 21(a) of the Bankruptcy Act (Act of Cong., Feb. 5, 1903, c. 487, § 7, 32 Stat. 798, 11 U. S. C. A., § 44[a]) (R. 3) were being conducted *not by the petitioner* but by Capital Company and another creditor (R. 3); that not until the completion of these § 21(a) examinations would petitioner be in a position to "enter upon the trial of the question of the ownership of the property and assets mentioned in the said [Pennsylvania] bill of complaint" (R. 7); that the Pennsylvania suit against him would disturb the orderly procedure by which Capital Company is acquiring the required information. Petitioner, pursuant to his order to show cause why the entire Pennsylvania suit should not be enjoined (R. 27-28), therefore prayed for an injunction against the continuance of the *entire* Pennsylvania suit (R. 9).

It is plainly apparent that the order of the bankruptcy court, dated October 7, 1936 (R. 31), entered upon petitioner's application, was procured for the single purpose of interfering with the normal and proper exercise by the United States District Court for the Eastern District of Pennsylvania, of the latter's first

and exclusive jurisdiction to determine the ownership and right to immediate possession of the *res* within its jurisdiction. Within one week after the order of the bankruptcy court enjoining respondent from further prosecuting its suit in the United States District Court for the Eastern District of Pennsylvania against petitioner, the latter commenced his plenary suit in the Chancery Court of the State of New Jersey (R. 36-90) and served upon respondent and other co-defendants a voluminous set of papers including a bill of complaint (R. 36-66), an affidavit in support thereof (R. 66-88), and an order to show cause with a restraining order (R. 88-90), restraining the respondent from further conduct of its business (R. 90), and, in addition, praying for the appointment of a receiver for respondent on the theory that respondent was in reality the "alter ego" of the bankrupt, William Fox (R. 90).

In addition, as that bill of complaint will show, petitioner secured permission from the referee in bankruptcy (R. 36), before whom the § 21(a) examinations were pending, permitting the aforesaid plenary suit in Chancery in New Jersey. *All these acts were done during the pendency of the § 21(a) examinations which have not yet been concluded.*

By virtue of this restraining order (R. 88-90), respondent's margin account with J. W. Sparks & Co. was put in further jeopardy. The restraining order was granted ex-parte, without any bond securing the respondent against loss. It restrained *all* transactions of respondent and did not except transactions in the ordinary course of business (R. 90). A modification of this ex-parte injunction, allowing respondent to carry on transactions in the ordinary course of business, was later obtained upon respondent's application to the Chancery Court of New Jersey over the petitioner's objection and opposition.

It seems plain that the petition presented by petitioner to the bankruptcy court was for the purpose of allowing petitioner to jockey the litigation into a jurisdiction which he preferred and not for the purpose revealed in his papers. Although petitioner has contended and argues extensively in his brief that he is seeking to protect the jurisdiction of the bankruptcy court, yet, when he procured the injunction from the bankruptcy court prohibiting respondent's prosecution of its Pennsylvania suit, petitioner promptly proceeded to institute his plenary suit not in the bankruptcy court, but in the Chancery Court of the State of New Jersey (R. 36).

In spite of the oft-repeated charge contained in petitioner's brief that the institution of respondent's Pennsylvania suit was a "conspiracy" and "scheme" on the part of respondent, to deprive the bankruptcy court of its jurisdiction, because, as petitioner contends, "the trustee and referee • • • [were] pressing too hotly on the trail of All Continent" (petitioner's brief, p. 30), the dominant fact remains that the United States District Court for the Eastern District of Pennsylvania was the sole tribunal to which respondent was able to resort in order to establish its claim to ownership and possession of the J. W. Sparks & Co. account.

Criticism of Petitioner's Statement of the Case.

1.

In his statement of the case, petitioner uses facts not appearing upon the record presented to this Court at the time of the presentation of the petition for the writ of certiorari granted herein. To justify the inclusion of these additional facts at this time without leave of this Court

petitioner asserts that this Court may take judicial notice of matters appearing in its own records, citing:

Craemer v. *Washington State,* 168 U. S. 124;
Washington & Idaho Railroad v. *Cour d'Alene Ry.,* 160 U. S. 101;
Fritzlen v. *Boatmen's Bank,* 212 U. S. 364;
United States v. *California Cooperative Canneries,* 279 U. S. 553;
National Fire Insurance Co. v. *Thompson,* 281 U. S. 331.

An additional step is then taken to indicate that judicial notice is not limited to matters appearing of record in cases previously adjudicated, but notice has been taken as well of matters appearing in the record of a case pending before this Court, citing:

West Ohio Gas Co. v. *Public Utilities Commission of Ohio,* 294 U. S. 63.

With this citation of authority, petitioner justifies the inclusion of an ex parte pleading compiled to show facts which bear out petitioner's contentions in the instant proceeding (petitioner's brief, p. 2).

There are four objections to the inclusion of the facts in the "record" in the proceeding referred to as *Matter of Steelman,* which was filed simultaneously with the record in this case. *First,* in every one of the six cases cited to sustain petitioner's contentions, a complete transcript of record relating to facts alleged by all parties to support their legal conclusions was before the court, the cases then being docketed in this Court, either as the result of a writ of error (*Craemer* v. *Washington State,* supra; *Washington & Idaho Railroad* v. *Cour d'Alene Ry.,* supra), writ of certiorari (*Fritzlen* v. *Boatmen's Bank,* supra; *National Fire Insurance Co.* v. *Thompson,* supra), by the entire

record being called up to this Court after certified questions had been lodged (*United States* v. *California Cooperative Canneries*, supra), or by appeal (*West Ohio Gas Co.* v. *Public Utilities Commission of Ohio*, supra).

In *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio*, supra, the record of which was examined by virtue of the doctrine of judicial notice, the case had not previously been adjudicated. However, an examination of that case will disclose that the record examined was that of a companion case, submitted with the *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio* case, argued on the same day and decided on the same day, both cases being heard on appeal from judgments rendered together in a joint appeal (*West Ohio Gas Co.* v. *Public Utilities Commission of Ohio*, 128 Ohio St. 301).

Not one of these cases refers to an ex parte "record" made up at the pleasure of a petitioner in this Court.

Secondly, in no proper sense do the facts alleged in the petition in *Matter of Steelman* constitute a "record", the facts of which may be used to support a proposition of law. The petition is no more than a pleading in a cause. An ex parte pleading which the adversary has never been afforded an opportunity to answer cannot be used as a "record" of a case pending before this Court, as petitioner contends. The evil which would result from the use of the petition in *Matter of Steelman* as a record is clearly shown by its incompleteness. For example, the order to show cause and the restraining order of the Chancery Court of the State of New Jersey (R. 88-90) secured by the petitioner herein against the respondent herein is omitted, for, though an important fact in the chain of events, it evidently did not serve petitioner's purpose to include it in the petition in *Matter of Steelman*, as it would have controverted the allegations in paragraph 63

(2) of the said petition (*Matter of Steelman*, R. 31). So too, there are many instances whereby allegations in the petition in *Matter of Steelman* can definitely be disproved by reference to other facts and other proceedings which, of course, cannot, and should not be brought to the attention of this Court at this time.

Thirdly, the respondent, contrary to the assertion of petitioner (petitioner's brief, p. 26), has never been called upon nor had an opportunity to answer the petition for the writ of mandamus and/or writ of prohibition, entitled *Matter of Steelman*. No motion for leave to file the said petition has been granted. No order to show cause has issued from this Court to the Hon. GEORGE A. WELSH, and the District Court of the United States for the Eastern District of Pennsylvania. In addition, the respondent is not the proper party to controvert the facts alleged in the petition for the said writs. The proper procedure is outlined in 16 *Hughes, Federal Practice, Jurisdiction & Procedure*, § 18,143, page 471, as follows:

> "Motion for leave to file petition for writ of prohibition and/or a writ of mandamus accompanied by the petition and supporting brief is made in open court. After the court grants leave to file the petition, the case is docketed and the court enters an order directing the judges of the court below to show cause why the writ should not issue. The judges of the court below then file their return, and preferred hearing, after application to the court, may be had."

True it is, that the respondent opposed the application for a temporary restraining order and for a temporary injunction on petition for a writ of prohibition and/or a writ of mandamus. This procedure was adopted because the attorneys of record for respondent were formally served with the petition for a temporary restraining order

and for a temporary injunction on January 9, 1937, at which time they were formally notified of the application to be made to the Honorable BENJAMIN N. CARDOZO on Monday, January 11, 1937, for the temporary restraining order and for the temporary injunction; they appeared and took part in the discussion of that application and were granted leave at that time to file any answer to that application for temporary relief which they deemed pertinent. At no time were they called upon either to answer the petition for the writ of prohibition and/or writ of mandamus or to controvert any of the assertions therein. Consequently, it would be an injustice to the respondent if this Court took judicial notice of the ex parte "record" in *Matter of Steelman*, which stands uncontroverted because the proper time and opportunity to answer the said petition has not yet arrived.

Fourthly, Matter of Steelman is not pending before the Court since the motion for leave to file the petition has not been granted. It is not until the motion is granted that the case is docketed (16 *Hughes, Federal Practice, Jurisdiction & Procedure*, § 18,143, p. 471).

2.

The petitioner's statement of the case also asserts that objections were raised to the respondent's proof of claim, which was filed in the William Fox bankruptcy proceeding (petitioner's brief, p. 5). Nowhere in the record which was before the bankruptcy court, nor in the record before the Circuit Court of Appeals, is there one word to the effect that an objection has been filed to respondent's proof of claim. Petitioner, at page 36 of his brief, admits that he has filed no objection to the claim of the respondent.

While this Court may receive and consider as an addition to the facts stated in the record before it *supervening*

matters occurring subsequent to the rendering of the decree of the bankruptcy court, dated October 7, 1936 (R. 31) (*Patterson* v. *Alabama*, 294 U. S. 600, 607; *National Surety Co.* v. *Coriell*, 289 U. S. 426), the Court may not permit the inclusion of facts arising *prior* to the petition of the trustee in bankruptcy (petitioner herein), to the bankruptcy court, dated September 21, 1936 (R. 2). Facts which then existed must be found in the petition (R. 2).

The only objection which was raised to the proof of claim of the respondent occurred on June 19, 1936, when a creditor voiced an objection at the first meeting of creditors held for the election of a trustee. If any issue is deemed to have been raised by an objection by a creditor (and it will be demonstrated in the ensuing argument that none was), such an issue, or the facts pertaining thereto, should have been included in the petition of the petitioner dated September 21, 1936 (R. 2), if petitioner intended to rely thereon.

Moreover, the fact that the objection of a creditor constitutes the foundation of an issue as to the identity of the respondent and the bankrupt was not raised previously to the petition for certiorari. It was not in the record before the bankruptcy court; it was not in the record before the Circuit Court of Appeals. Nor was any question submitted to either court relating to a possible joinder of issue because of a creditor's objection to the respondent's claim. This Court has held that it would not consider a point not raised prior to the petition for certiorari (*Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, 380).

3.

Petitioner's brief presents two questions for the consideration of the Court at this time, the first question referring to the decision of the Circuit Court of Appeals and the second question referring to the dicta in the opinion of the Circuit Court of Appeals. On the other

hand, there was but a single question presented in the petition for the writ of certiorari granted herein, which is quoted in full at pages 1-2, supra.

It is respectfully submitted that "the only question for consideration is that stated in the petition for the writ of certiorari. Gunning v. Cooley, 281 U. S. 90, 98." (*Helvering* v. *Taylor*, 293 U. S. 507, 511.) Therefore, there is but one question before this Court, viz, the decision of the Circuit Court of Appeals. There is no question before this Court as to dicta contained in its opinion.

Summary of Argument.

I. The bankruptcy court did not have the power by injunction to restrain the Pennsylvania suit against the petitioner as that suit does not in any way impair or defeat the jurisdiction of the bankruptcy court.

1. The suit does not seek to reach or interfere with assets in the actual or constructive possession of the bankruptcy court.

2. The injunctive power of the bankruptcy court to restrain proceedings against a trustee in bankruptcy extends only to the protection of the assets in the actual or constructive possession of the bankruptcy court.

II. The District Court of the United States for the Eastern District of Pennsylvania acquired exclusive jurisdiction over the controversy therein.

III. The petitioner is a proper party defendant in the Pennsylvania suit.

IV. Dicta cannot be prejudicial to the petitioner.

ARGUMENT

POINT I

The bankruptcy court did not have the power by injunction to restrain the Pennsylvania suit against the petitioner as that suit does not in any way impair or defeat the jurisdiction of the bankruptcy court.

1. The suit does not seek to reach or interfere with assets in the actual or constructive possession of the bankruptcy court.

The shares of stock which constitute the *res* which give the District Court of the United States for the Eastern District of Pennsylvania jurisdiction over the suit commenced pursuant to § 57 of the Judicial Code are not and never were in the *actual* possession of the bankruptcy court. They are assets of the respondent, physically located within the Eastern District of Pennsylvania (R. 92), held by respondent's brokers, J. W. Sparks & Co. The assets were given into the possession of the said brokers pursuant to duly authorized agreements executed by respondent on January 7, 1936 (R. 96-99). The securities in the said account created by the respondent were accepted by the brokers as the property of the respondent (R. 93). No claim is made by petitioner that the bankrupt ever had possession of the securities which constitute the *res* in the Pennsylvania suit. Consequently, the bankruptcy court never obtained actual possession of these assets of the respondent, either at the date of the adjudication in bankruptcy of William Fox (May 29, 1936) (R. 3), or subsequent thereto.

Likewise, the assets of the respondent are not in the *constructive* possession of the bankruptcy court. (*Taubel-*

Scott-Kitzmiller Company, Inc. v. *Fox*, 264 U. S. 426, 432, 433, 438.)

In *In Re Dayton Coal & Iron Co.* (D. C. E. D. Tenn., 1922), 291 Fed. 390, the limitations of a bankruptcy court's constructive possession is stated as follows:

> "The custody, or constructive possession, of the debtor's property which is vested in the bankruptcy court by the filing of the petition, ex propria vigore, extends, however, only to the property then held by him or for him, of which the court might summarily take possession. See: *Orinoco Iron Co.* v. *Metzel* (6th Cir.), 230 Fed. 40, 44, 144 C. C. A. 338; 2 Rem. Bankcy. (2d Ed.), § 1807, p. 1692. And it does *not* extend to property otherwise held as to which an adverse claimant has a substantial pre-existing claim of lien or title, whose validity, in the absence of actual possession by the bankruptcy court, can only be determined in a plenary suit by the trustee in bankruptcy" (p. 396). (Italics ours.)

Likewise, in *Lynch* v. *Roberson* (C. C. A. 6, 1923), 287 Fed. 433, the Circuit Court of Appeals held:

> "• • • While the bankruptcy adjudication put in the custody of the bankruptcy court all the bankrupt's property, either actually or constructively in its possession, including property held not only by, but for, the bankrupt (In re Orinoco Corporation, supra), *it did not, as a matter of law, put into the custody of the bankruptcy court anything which the Coal Company then neither owned nor claimed title to*" (p. 438). (Italics ours.)

The law is well settled that:

> "Upon adjudication in bankruptcy, all the *property of the bankrupt* vests in the trustee as of the date of the filing of the petition. Upon such filing, the jurisdiction of the bankruptcy court becomes paramount and exclusive; and thereafter that court's

possession and control of the estate cannot be affected by proceedings in other courts, whether state or federal. Gross v. Irving Trust Co., 289 U. S. 342, 344; Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 307; In re Diamond's Estate, 259 Fed. 70, 73. This applies while the possession is constructive as well as when it becomes actual. Mueller v. Nugent, 184 U. S. 1, 14; Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 432-433; Orinoco Iron Co. v. Metzel, 230 Fed. 40, 44-45, and cases cited." (*Taylor* v. *Sternberg*, 293 U. S. 470, at p. 472.) (Italics ours.)

The adjudication in bankruptcy, therefore, is a caveat to the world that the bankruptcy court has exclusive jurisdiction as to the *property of the bankrupt* from the date of the filing of the petition, May 29, 1936 (R. 3). This is stated in *In Re Smith* (D. C. S. D. Tex., 1924), 3 F. (2d) 40, aff. sub. nom. *Paynter* v. *Slator* (C. C. A. 5, 1925), 8 F. (2d) 1021, as follows:

"This caveat, however, does not extend to all property to which the bankrupt has title, but only to that of which he has possession also, as to which property the summary jurisdiction of the bankruptcy court is complete. *As to all property of the bankrupt not in his possession at the time of the bankruptcy, the doctrine of custodia legis does not extend, until by plenary suit it has been reduced to possession*" (p. 42 of 3 F. [2d]). (Italics ours.)

The securities involved in the Pennsylvania suit, "were not at any time and are not now [September 8, 1936] the property of the said William Fox, judgment-debtor, but on the contrary are now, and at all times were the property of the plaintiff [respondent herein]" (R. 22). Obviously, therefore, these securities never were reduced to possession by the petitioner. The first attempt to reduce them to possession was made on October 13, 1936, by

petitioner's plenary suit in the Chancery Court of the State of New Jersey (R. 36-55).

The commencement of this plenary suit is an admission by petitioner that the assets of the respondent are not within the constructive possession of the bankruptcy court. Had they been in the constructive possession of the bankruptcy court the petitioner could and would have commenced a summary proceeding to acquire possession of these assets of the respondent. A plenary suit is only necessary where the bankruptcy court has neither actual nor constructive possession.

Harrison v. *Chamberlin*, 271 U. S. 191;
Weidhorn v. *Levy*, 253 U. S. 268;
Fort Dearborn Trust & Savings Bank v. *Smalley* (C. C. A. 8, 1924), 298 Fed. 45.

2. The injunctive power of the bankruptcy court to restrain proceedings against a trustee in bankruptcy extends only to the protection of the assets in the actual or constructive possession of the bankruptcy court.

Since the assets involved in the Pennsylvania suit are not in the possession of the bankruptcy court, the bankruptcy court has no power to enjoin that suit against the petitioner, as trustee in bankruptcy, *in which suit no attempt is made to recover assets within the possession of the bankruptcy court.* This doctrine has oft been repeated under varying circumstances. The case analogous to the instant one is *Fort Dearborn Trust & Savings Bank* v. *Smalley* (C. C. A. 8, 1924), 298 Fed. 45. The bankruptcy court had summarily made an order enjoining the Fort Dearborn Trust & Savings Bank (hereinafter referred to as the "Bank") and one Forrey, who were trustees under a mortgage or deed of trust, from foreclosing that mortgage. The Bank and Forrey petitioned the Circuit Court

of Appeals to revise the order of the District Court, urging that the injunction was erroneous as a matter of law. The facts are briefly as follows:

In February of 1919, the Globe Company gave a mortgage in which the Bank and Forrey were made trustees. On February 17, 1920, the Globe Company contracted to sell the mortgaged property to one Skelly Company, which immediately took possession, and "was at all times after February 25, 1920, in the actual and exclusive possession of the property" (p. 50). On May 29, 1920, and on June 3, 1920, involuntary petitions in bankruptcy were filed against the Globe Company. On June 2, 1920, Skelly Company filed suit in the State District Court in Tulsa County, Oklahoma, against the Globe Company, as vendor, the Bank and Forrey, as the mortgage trustees, and others, for specific performance of the aforementioned contract of February 17, 1920. On June 29, 1920, the Globe Company was adjudicated a bankrupt upon the petition dated June 3, 1920. Prior to June 29, 1920, the Bank and Forrey, as trustees, filed an answer and cross-complaint in the State court suit, praying in the cross-complaint that the bankrupt's equity be foreclosed. *Without the consent, or leave of the bankruptcy court* (p. 49), the "cross-complaint brought in the trustees in bankruptcy as parties to the cause; and thereupon they initiated the proceedings which resulted in the injunctive order here complained of" (p. 47). The trustees in bankruptcy were made parties defendant by a summons issued out of the State court on the application of the Bank and Forrey. In answer to the contention of the trustees in bankruptcy that the State court suit should be enjoined, the Bank and Forrey asserted that the bankruptcy court was without jurisdiction, because the property was not, nor had it ever been at any time in the actual possession of the trustees in bankruptcy, the bankruptcy court or its agents nor was it

at the time of the filing of the petition in bankruptcy in the actual possession of the bankrupt or its agents; that it is in the actual possession of Skelly Company, which claims rights, title and interest therein adverse to the trustees in bankruptcy. The Bank and Forrey also asserted a second defense to the effect that the State court had jurisdiction over the subject matter, parties and res involved. The bankruptcy court overruled the plea to its jurisdiction and granted the injunction. In answer to the petition to revise, the trustees in bankruptcy alleged that the suit of Skelly Company in the State court was brought after the first petition in bankruptcy was filed, when no court, except the bankruptcy court had or could acquire jurisdiction over the assets of the bankrupt estate. Vacating the injunctive order and dismissing the petition of the trustee in bankruptcy, the Circuit Court of Appeals held:

> "• • • Nothing appears which discredits the claim that Skelly Co. was at all times after February 25, 1920, in the actual and exclusive possession of the property. The trustees under the mortgage offered to establish that as a fact by proof when they were brought into the Bankruptcy Court. Fort Dearborn Bank and Forrey as trustees were then adverse claimants. First National Bank v. Title & Trust Co., 198 U. S. 289, 291, 25 Sup. Ct. 693, 49 L. Ed. 1051; In re Rathman, 183 Fed. 913, 920, 921, 106 C. C. A. 253; Stone-Ordean-Wells Co. v. Mark, 227 Fed. 975, 978, 142 C. C. A. 433. And before the Bankruptcy Court could deny them in a summary proceeding the right to apply the mortgaged property to the payment of the mortgage debt it was incumbent on the trustees in bankruptcy to establish that the bankrupt, or some one as its agent, had possession of the property at the time the petition in bankruptcy was filed, or that since then it had come into their possession or the possession of some other officer of that court. *The Bankruptcy Court could not take summary action until it had been so established* • • •" (p. 50).

"• • • A fair and reasonable estimate of the undisputed facts and the respective allegations as to possession at the time the petition in bankruptcy was filed requires, we think, a conclusion that Skelly Co. was and had been at all times, as claimed, in the actual possession of the property. However that may be, under denial of the claim of possession in the bankrupt made by the trustees in bankruptcy, it was their duty to establish that claim, and having failed to do so *the court was without power to make the order of December 5th*" (pp. 50, 51).

"• • • These are valuable rights, judicable in the State court, and when the cross-complaint was filed it was the duty of that court to ascertain them and enforce them; and the *Bankruptcy Court could not rightfully prevent their enforcement in that court, unless at that time it had within its custody and under its control the mortgaged property.* Hiscock v. Varick Bank, 206 U. S. 28, 41, 27 Sup. Ct. 681, 51 L. Ed. 945; Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; Jaquith v. Rowley, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620; In re Rathman, supra; In re San Gabriel Sanatorium Co., 111 Fed. 892, 50 C. C. A. 56; Id. 102 Fed. 310, 42 C. C. A. 369; Duncan v. Girand (C. C. A.), 276 Fed. 554; In re Dayton Coal & Iron Co. (D. C.), 291 Fed. 390, 401; Murphy v. John Hofman Co., 211 U. S. 568, 569, 29 Sup. Ct. 154, 53 L. Ed. 327.

"We think it entirely clear on the facts presented that the Bankruptcy Court at no time had custody of the property, that it was never in the possession of that court, but that Skelly Co. was at all times after February 25, 1920, in possession, until it was taken over by the State court receiver. • • • *On the filing of the cross-complaint the State court obtained exclusive control of the property* for the purposes of foreclosure and sale. The issues required the State court to deal with the mortgaged property, to ascertain the amount of and enforce the admitted and existing lien against that property and to sell it in the exercise of its jurisdiction.

No other court had theretofore obtained possession of it and no other court could lawfully interfere with it in the exercise of its powers over the subject matter in litigation. Kline v. Burke Constr. Co., 260 U. S. 226, 43 Sup. [Ct.] 79, 67 L. Ed. 226, 24 A. L. R. 1077; Round City Co. v. Castleman, 187 Fed. 921, 924, 110 C. C. A. 55.

"The petition to revise is sustained, the injunctive order of December 5, 1922, will be vacated, and the petition of the trustees in bankruptcy on which that order was entered will be dismissed, all costs to be adjudged against the trustees in bankruptcy" (pp. 51, 52).

That the injunctive power of the bankruptcy court is limited to the protection of the assets within the possession of the bankruptcy court is demonstrated by the *ratio decidendi* of and statements in the following three cases:

In *Molina v. Murphy* (C. C. A. 1, 1934), 71 F. (2d) 605, the bankruptcy court granted an injunction against the appellant and others from proceeding with sales under a decree in a foreclosure suit upon the ex parte application of petitioner. The injunction, later modified, was appealed from and the principal question was,

"whether the bankruptcy court had jurisdiction to grant the injunction" (p. 606).

The Circuit Court of Appeals reversed the injunctive order on the ground that the bankruptcy court was without jurisdiction to enjoin the foreclosure proceedings because the property was in the possession of the receivers of the district court of San Juan at the time the extension proposal under § 74 of the Bankruptcy Act (Act of Cong., Mar. 3, 1933, c. 204, 47 Stat. 1467; 11 U. S. C. A., § 202) was filed. Since the property was not in the actual or constructive possession of the debtor or officer of the

bankruptcy court the Circuit Court of Appeals held the bankruptcy court was without power to enjoin either under § 74(n)(h) of the Bankruptcy Act (11 U. S. C. A., § 202[n][h] or *by reason of it having the same powers and jurisdiction as the bankruptcy court in the instant case*, pursuant to § 74(m) of the Bankruptcy Act (11 U. S. C. A., § 202[m]).

In *Petition of Schwartz* (C. C. A. 1, 1925), 7 F. (2d) 79, on petition to revise an injunction of the bankruptcy court which restrained an action for conversion, the Circuit Court of Appeals held that the bankruptcy court is without jurisdiction to enjoin the institution of a suit in a State court where such suit does not interfere with its possession, either actual or constructive, of the assets of the bankrupt.

Likewise, in *In re Adolf Gobel, Inc.* (C. C. A. 2, 1936), 80 F. (2d) 849, the Circuit Court of Appeals stated the rule as follows:

> "• • • In ordinary proceedings in bankruptcy, subdivision (15) of section 2 confers the power to enjoin the prosecution of an action in a state court *only* when the action interferes with *property* which is in the actual or constructive possession of the bankrupt at the date of the filing of the petition" (p. 852). (Italics ours.)

This rule has been applied in cases wherein a trustee in bankruptcy had been made a party defendant and he sought the aid of the bankruptcy court, praying for an injunction restraining the prosecution of the suit against him.

In *In re French* (D. C. W. D. Mich., 1927), 18 F. (2d) 792, the trustee in bankruptcy petitioned the bankruptcy court for an injunction against a suit brought against him

for conversion for wrongfully possessing himself of property of a person other than the bankrupt. Denying the injunction, the court stated:

> "Under this statute it has been held repeatedly that federal courts may enjoin proceedings pending in state courts relating to *possessory* rights in property being administered in the bankruptcy courts. See Hebert v. Crawford, 228 U. S. 204, 33 S. Ct. 484, 57 L. Ed. 800; Murphey v. John Hofman Co., 211 U. S. 562, 29 S. Ct. 154, 53 L. Ed. 327" (p. 793). (Italics the Court's.)

Since conversion is an action not involving a *res* within the possession of the bankruptcy court, the bankruptcy court held it was "*without jurisdiction to enjoin*" the action against the trustee in bankruptcy.

In a bankruptcy proceeding instituted soon after the effective date of the Bankruptcy Act of 1898, *In re Buntrock Clothing Co.* (D. C. N. D. Iowa, 1899), 92 Fed. 886, District Judge SHIRAS reviewed a referee's order compelling chattel mortgagees to turn over to the trustee in bankruptcy, on his summary application, mortgaged property, which "had passed into the possession of the mortgagees before the proceedings in bankruptcy were instituted" (p. 888). Judge SHIRAS held the mortgagees could not be compelled to yield up possession by orders entered in a summary proceeding. Thereafter the mortgagees commenced suit in the State court against the trustee in bankruptcy and the bankrupt to foreclose the chattel mortgage executed by the bankrupt. The trustee in bankruptcy then by bill in equity in the United States District Court sought to restrain the mortgagees from further prosecuting the State court suit against him (*Heath v. Shaffer* [D. C. N. D. Iowa, 1899], 93 Fed. 647). On application for a preliminary injunction, the facts developed in-

dicated that after the bankrupt executed the mortgage, and prior to the filing of the petition in bankruptcy, the defendant mortgagees took possession of the property, which possession they refused to yield to the trustee in bankruptcy. The prayer of the bill in equity is that the mortgage be declared to be fraudulent and void because it contravened the Bankruptcy Act and that the defendants be enjoined from prosecution of the foreclosure suit. Judge SHIRAS, denying the preliminary injunction, held:

> "Upon the face of the present bill, it appears that the mortgage complained of was executed, and *possession of the mortgaged property was taken, by the defendants herein, long previous to the filing of the petition in bankruptcy.* The mortgagees, desiring to foreclose the mortgage, brought suit to that end in the state court, *that being the only court in which they could institute foreclosure proceedings. The mortgaged property was not in possession of the trustee or of the court of bankruptcy, and the foreclosure proceedings were not brought for the purpose of taking the property away from the trustee, or from in any mode interfering with the control of any property in the actual custody of the court in bankruptcy;* and I can see no ground for holding that the state court was without jurisdiction to entertain the suit originally, or that the suit should be stayed by an injunction from this court" (pp. 650, 651). (Italics ours.)

In *In re Grissler* (C. C. A. 2, 1905), 136 Fed. 754, the trustee in bankruptcy of certain subcontractors was made a party defendant in a State court suit to enforce a mechanic's lien, which was commenced after the appointment of the said trustee in bankruptcy. The trustee in bankruptcy applied to the bankruptcy court for an injunction against the State court suit. The bankruptcy court granted the injunction which on appeal was reversed by the Circuit Court of Appeals which found no provision in

the Bankruptcy Act to stay such a suit in a case where property was not in the custody of the bankruptcy court.

In *In re J. M. Mertens & Co.* (C. C. A. 2, 1906), 147 Fed. 182, the bankruptcy court restrained the plaintiff in a State court action of trover brought against a trustee in bankruptcy. The Circuit Court of Appeals vacated the injunction.

In *In re Barber* (S. D. N. Y., 1934), 7 F. Supp. 806, the bankruptcy court refused to stay further prosecution of a State court action to enforce a mechanic's lien, the bankrupts being subcontractors, claimants of part of the fund involved in the State court action.

In *In re John Condon Contracting Co., Inc.* (E. D. N. Y., 1932), 1 F. Supp. 447, the bankruptcy court held that the assignee of certain highway contracts which were completed under an agreement with the bankrupt, a contractor, might commence and maintain a suit to foreclose a lien in the State court, and might join the trustee in bankruptcy as a defendant. The court there said:

> "*The fund in question is not in the bankruptcy court*, and consequently decisions holding that the foreclosure of a mortgage covering property to which the trustee in bankruptcy holds title should not be permitted to proceed, except in the bankruptcy court, seem not to be in point.
>
> "The trustee has no present title to the funds in the hands of the state comptroller, nor are they in his custody; therefore the award of these funds can properly proceed from adjudication in a plenary suit only" (pp. 447, 448).

After reargument (2 F. Supp. 52) the bankruptcy court modified its decision, holding that the trustee in bankruptcy (over his objection) be made a party defendant

in a State court action to foreclose a lien upon the fund, commenced after the filing of the involuntary petition in bankruptcy, and in which the assignee alleged he was entitled to affirmative relief against the trustee.

Respondent has found only one determination of this Court pertinent to the instant case. In *Hebert* v. *Crawford*, 228 U. S. 204, a State court suit against a trustee in bankruptcy was commenced after the bankruptcy proceedings were instituted. This suit was to recover from the trustee in bankruptcy money received by him with notice that it was taken from the plaintiff's bank account in violation of a State court injunction order in an equity suit commenced after the bankruptcy proceedings were started. This Court held that the State court had properly acquired jurisdiction over the trustee in bankruptcy because the money "paid and held did not thereby become a part of the *res* within the exclusive control of the bankrupt court" (p. 210). Therefore, *the bankruptcy court's injunction was reversed in so far as it enjoined the plaintiff in the State court action from suing the trustee in bankruptcy as to assets not within the possession of the bankruptcy court.*

Respondent does not disagree with those generalizations set forth in Point I of petitioner's brief which refer to cases in which the bankruptcy court had possession of the *res*. However, the rationale of the cases cited above, in which the *res* is not within the possession of the bankruptcy court, constitutes a specific limitation upon the generalizations quoted by the petitioner. We may admit, therefore, for the sake of argument, that if the *res* were in the possession of the bankruptcy court, then that court has "power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction", as stated in *Continental Illinois National Bank & Trust Company* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S.

648, 675. This case can readily be distinguished from the instant one for the following reasons:

(1) In the *Continental Illinois Bank* case, under § 77 of the Bankruptcy Act (Act of Cong., Mar. 3, 1933, c. 204, § 77, 47 Stat. 1474; 11 U. S. C. A. § 205), the court by express provision of the statute was given exclusive jurisdiction of the debtor's "property wherever located" (p. 662) and the *res* involved was one in which the debtor admittedly had a "property interest" (p. 681).

(2) This Court specifically limited its decision to proceedings under § 77 of the Bankruptcy Act (11 U. S. C. A. § 205) which was "not an ordinary proceeding in bankruptcy" and stated it was unnecessary to express an opinion as to the bankruptcy court's power to issue injunctions in an "ordinary bankruptcy proceeding" (p. 676).

(3) There, "no adverse claim was brought forward by either of the parties to the controversy" (p. 675). In such a case, it is clear that the bankruptcy court had summary power to enjoin interference with the *res*.

Petitioner lists cases to indicate that the bankruptcy court has power to restrain the sale, removal or other disposition of property in the possession of adverse claimants. There is no issue as to that proposition involved herein. Petitioner has applied that rule in the plenary suit, commenced by his bill of complaint and the affidavit in the Chancery Court of New Jersey (R. 36-88), where, on application, petitioner obtained a restraining order (R. 88-90), which is still in full force and effect, except as subsequently modified, only as to respondent. The respondent has not challenged this injunctive power.

Petitioner, in his brief at pages 21 and 22, discussing the difference between "substantial" and "merely colorable" adverse claims, quotes from *Harrison* v. *Chamberlin*, 271 U. S. 191, and urges that, "It follows that the trustee must make a 'preliminary inquiry' in order to ascertain of which character the adverse claim is. The making of this inquiry must be protected, if necessary, by injunction • • •" (p. 22).

Petitioner misinterprets the rule of *Harrison* v. *Chamberlin* (supra) when he states that it is for the petitioner to make the "preliminary inquiry". The "preliminary inquiry" is not that of the trustee in bankruptcy, but that of the bankruptcy court at the beginning of a summary proceeding (commenced by the trustee in bankruptcy to recover assets alleged to be the property of the bankrupt), wherein the defense is no jurisdiction, because of a substantial adverse claim. This is found at page 194 of 271 U. S., as follows:

> "However, the court is not ousted of its jurisdiction by the mere assertion of an adverse claim; but, having the power in the first instance to determine whether it has jurisdiction to proceed, the *court* may enter upon a *preliminary inquiry* to determine whether the adverse claim is real and substantial or merely colorable. And if found to be merely colorable the Court may then proceed to adjudicate the merits summarily; but if found to be real and substantial it must decline to determine the merits and dismiss the summary proceeding." (Italics ours.)

That case, therefore, stands for the well recognized proposition that "the District Court had jurisdiction to determine whether it could or could not proceed further. *Louisville Trust Co.* v. *Comingor*, 184 U. S. 18; *Mueller* v. *Nugent*, 184 U. S. 1; *Schweer* v. *Brown*, 195 U. S. 171"

(*First National Bank of Chicago* v. *Chicago Title and Trust Company*, 198 U. S. 280, 291).

Thus, the quotation on page 22 of petitioner's brief, from *In re Norris* (W. D. N. Y., 1910), 177 Fed. 598, correctly states the proposition, but this does not mean that the trustee makes the preliminary inquiry in examinations, pursuant to § 21(a) of the Bankruptcy Act.

The fact that petitioner concluded, without resorting to a summary proceeding in the bankruptcy court, that a plenary suit was necessary as evidenced by the institution of his plenary suit in the Chancery Court of New Jersey (R. 36), establishes that the adverse claim of the respondent was not colorable. If petitioner had had any doubt, he would have applied for a summary order to test the substantiality of the respondent's adverse claim.

Petitioner, relying on *Local Loan Co.* v. *Hunt*, 292 U. S. 234, states that the bankruptcy court may restrain prosecution by creditors or adverse claimants of litigation in courts outside of the bankruptcy court, "when it is made to appear that such litigation either will interfere with the administration of the bankruptcy proceedings in the bankruptcy court or will substantially and practically frustrate the purpose of the bankruptcy proceedings" (petitioner's brief, p. 22). In the *Local Loan Co.* case, supra, there were no bankruptcy proceedings pending. It does not involve the administration of a bankrupt's estate. The bankrupt had received his discharge. It was that order of discharge, a decree of the bankruptcy court, which this Court held could be protected from subsequent litigation (which would nullify the bankruptcy court's decree) because of the general rule that any court may protect its own decrees and judgments by ancillary proceedings for an injunction.

Petitioner, at pages 24 and 25 of his brief, cites a number of cases wherein the lower courts have enjoined collateral litigation of bankruptcy proceedings outside the bankruptcy court. In *In re Trayna & Cohn* (C. C. A. 2, 1912), 195 Fed. 486, the *res* was in the possession of the bankruptcy court as part of the bankrupt's estate. In a later case, within the same circuit, *In re Polok* (S. D. N. Y., 1931), 55 F. (2d) 417, a motion of a trustee in bankruptcy to stay the prosecution of a conversion action against him then pending in the State court was denied and *In re Trayna & Cohn,* supra, distinguished on the ground that in the latter case the plaintiff in the State court action had consented to a consideration of title by the bankruptcy court and then later sought to raise the same questions in the State court action. Again, it is manifest that actions against trustees in bankruptcy in courts other than the bankruptcy court, which do not involve the *res* in the possession of the bankruptcy court, are not enjoined.

In none of the remaining four cases cited by petitioner, at pages 24 and 25, is there involved the question of the bankruptcy court's power to enjoin a suit against a trustee in bankruptcy in a court other than the bankruptcy court.

The rationale of all the cases heretofore cited is that *the bankruptcy court is without power to enjoin actions against trustees in bankruptcy, relating to the rights of the said trustees, but not involving assets in the possession of the bankruptcy court,* notwithstanding its power to enjoin proceedings against trustees in bankruptcy which interfere with assets within the possession of the bankruptcy court.

POINT II

The District Court of the United States for the Eastern District of Pennsylvania acquired exclusive jurisdiction over the controversy therein.

Certificates of stock are property within the meaning of § 57 of the Judicial Code and constitute the *res* in the jurisdiction wherein the certificates are located.

Franz v. *Franz* (C. C. A. 8, 1926), 15 F. (2d) 797, certiorari denied, 273 U. S. 756;

Beal v. *Carpenter* (C. C. A. 8, 1916), 235 Fed. 273;

Blake v. *Foreman Bros. Banking Co.* (N. D. Ill., 1914), 218 Fed. 264;

Merritt v. *American Steel-Barge Co.* (C. C. A. 8, 1897), 79 Fed. 228.

An action commenced pursuant to § 57 of the Judicial Code is in the nature of an action in rem as it "involves the potential necessity of assuming control of that property for the purpose of enforcing any decree that may be rendered, and of preventing any disposition of the property that may impair the efficacy of that decree" (*Franz* v. *Franz,* supra, at p. 801).

The suit in the Chancery Court of New Jersey is likewise a suit quasi *in rem* which seeks a determination of the ownership of the assets of the respondent, for the petitioner in that suit seeks the appointment of a receiver (R. 54), sought and procured an *ex parte* injunction against any transfer of the assets of respondent by its officers (R. 88).

Thus, there are two suits *in rem* relating to the assets of the respondent. The Pennsylvania suit was commenced

on September 8, 1936 (R. 16); thereafter, the Chancery suit was commenced on October 13, 1936 (R. 88).

> "If two suits are in *rem* or *quasi in rem*, so that the court must have possession or control of the *res* in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other." (*United States* v. *Bank of New York and Trust Company*, 296 U. S. 463, 477.)

The jurisdiction of the court in which the suit was first brought is paramount to that of any other court.

> *Penn General Casualty Company* v. *Pennsylvania*, 294 U. S. 189, 197;
> *Harkin* v. *Brundage*, 276 U. S. 36, 43;
> *Palmer* v. *Texas*, 212 U. S. 118, 129;
> *Farmers Loan and Trust Company* v. *Lake Street Elevated Railroad Co.*, 177 U. S. 51, 61.

In *Penn General Casualty Company* v. *Pennsylvania*, 294 U. S. 189, the general and frequently expressed rule as to the exclusiveness of jurisdiction was set forth as follows:

> "Where the judgment is strictly *in personam*, for the recovery of money or for an injunction compelling or restraining action by the defendant, both a state court and a federal court having concurrent jurisdiction may proceed with the litigation, at least until judgment is obtained in one court which may be set up as *res adjudicata* in the other. See *Buck* v. *Colbath*, supra [3 Wall. 334], 342; *Kline* v. *Burke Construction Co.*, 260 U. S. 226, and cases cited at pages 230-231. But if the two suits are *in rem* or quasi *in rem*, requiring that the court or its officer have possession or control of the property which is the subject of the suit in order to proceed with the cause and to grant the relief sought, the juris-

> diction of one court must of necessity yield to that of the other. To avoid unseemly and disastrous conflicts in the administration of our dual judicial system, see *Peck* v. *Jenness*, 7 How. 612, 625; *Taylor* v. *Carryl*, 20 How. 583, 595; *Freeman* v. *Howe*, 24 How. 450, 459; *Buck* v. *Colbath*, supra, 341; *Farmers' Loan & Trust Co.* v. *Lake Street Elevated R. Co.*, supra [177 U. S. 51], 61, and to protect the judicial processes of the court first assuming jurisdiction, *Wabash R. Co.* v. *Adelbert College*, supra [208 U. S. 38], 54; *Palmer* v. *Texas*, 212 U. S. 118, 129, 130, the principle, applicable to both federal and state courts, is established that the court first assuming jurisdiction **over the property** may maintain and exercise that jurisdiction to the exclusion of the other" (p. 195). (Italics the Court's; emphasis ours.)

Since the Pennsylvania suit was instituted prior to the Chancery suit, it is the Pennsylvania District Court and not the Chancery Court which has paramount jurisdiction of the issue as to the ownership of the assets constituting the J. W. Sparks account. The only manner in which the paramount jurisdiction as to this issue in the Pennsylvania District Court could be attacked would be if the bankruptcy court had acquired *in rem* jurisdiction as to the assets involved prior to the commencement of the Pennsylvania suit on September 8, 1936 (R. 16). The protection of the paramount and exclusive jurisdiction of a bankruptcy court is no more sacred than the protection of the paramount and exclusive jurisdiction of any other court, Federal or State. There is nothing sacrosanct about the jurisdiction of a bankruptcy court. The exclusive jurisdiction of the bankruptcy court is merely an application of the general rule concerning *in rem* actions. (*Murphy* v. *John Hofman Co.*, 211 U. S. 562, 568, 569; *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 737, 738.)

Therefore, the proposition before this Court to be determined is whether or not the bankruptcy court as distinguished from the Court of Chancery of New Jersey, acquired exclusive jurisdiction over the controversy relating to the assets of the respondent prior to the commencement of the Pennsylvania suit. If the bankruptcy court did not acquire *in rem* jurisdiction over the assets of the respondent, then clearly, the District Court of the United States for the Eastern District of Pennsylvania did acquire such paramount and exclusive jurisdiction which is entitled to protection by this Court.

The Circuit Court of Appeals, realizing this situation in which proceedings were pending in three courts, held that the bankruptcy court had no power to enjoin the Pennsylvania suit as against the petitioner (R. 106), and stated the general rule that exclusive jurisdiction as to the assets in an *in rem* proceeding is given to the first court in which an *in rem* proceeding is commenced (R. 105).

The bankruptcy court does not have jurisdiction over the assets which petitioner claims belong to the bankrupt estate when such assets are in the actual possession of an adverse claimant and not in the actual or constructive possession of the petitioner or the bankruptcy court. In the recent case of *Southwestern Lumber Co. of New Jersey* v. *Kerr* (S. D. Texas, 1934), 11 F. Supp. 253, a suit in equity was commenced by a pledgee of collateral security (shares of stock) against the trustee in bankruptcy of the pledgor, to require the trustee in bankruptcy "to set up in this cause any rights he may have" and to enjoin the said trustee in bankruptcy from instituting suits in other courts respecting the matter and "for such order, orders or decrees" to prevent the trustee from interfering with and preventing the pledgee from selling the collateral (11 F. Supp. 253, 255). The trustee in bankruptcy contended, "that this court is without juris-

diction to entertain the plaintiff's suit, and that jurisdiction is exclusively in the bankruptcy court in this district [in which the bankrupt had been adjudicated upon his voluntary petition]." (11 F. Supp. 253, 256.)

The District Court found:

> "(g) All of the stock certificates were indorsed by Kirby [the bankrupt pledgor], and delivered on the dates of the respective pledge agreements, to plaintiff, *and have since been in the actual physical possession and custody of plaintiff, and not in the actual nor constructive possession of either Kirby, or defendant, his trustee.* The stock was not transferred to plaintiff on the stock transfer books of [the Kirby] lumber company." (11 F. Supp. 253, 258.) (Italics the Court's.)

The District Court held:

> "The foregoing discussion is upon the finding and conclusion that the bankruptcy court and defendant, its trustee, have *neither actual nor constructive possession of the stock.* • • •
>
> "I think, however, there is no escape from the conclusion that plaintiff, and not the bankruptcy court, has possession of the stock, and that this court properly took jurisdiction of plaintiff's bill when filed, and has jurisdiction now. Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 44 S. Ct. 396, 68 L. Ed. 770; In re Hudson River Nav. Corp., supra [(C. C. A.) 57 F. (2d) 175]; In re Greenbaum & Sons (D. C.), 6 F. Supp. 245." (11 F. Supp. 253, 259.) (Italics the Court's.)

On the merits the District Court granted to plaintiff the relief prayed for. On appeal the judgment of the District Court was affirmed (*Kerr* v. *Southwestern Lumber Co. of New Jersey* [C. C. A. 5, 1935], 78 F. [2d] 348). This Court denied certiorari, 296 U. S. 611.

Thus the bankruptcy court has no power to interfere with the United States District Court for the Eastern District of Pennsylvania (a Federal court sitting as a court of equity), which has acquired jurisdiction over the controversy, the parties and the res.

The petitioner's petition to the bankruptcy court (R. 2) in which he sought to restrain the prosecution of the Pennsylvania suit, is devoid of any reference that up to that time, there was any *issue* in the bankruptcy court as to the identity of the bankrupt and the respondent or any *issue* as to the ownership of respondent's assets in the J. W. Sparks account.

Now, upon certiorari for the first time petitioner urges that even before he instituted his suit in the Chancery Court of New Jersey, an issue had been raised as to the identity of the bankrupt and the respondent. This he claims resulted from the filing by respondent of its proof of claim in the bankruptcy, and because at the time that the trustee was being elected at the first meeting of creditors, Capital Company, one of the creditors, objected to this claim of the respondent.

Petitioner's contention is untenable:

Nowhere in the transcript of record is there a single reference to this alleged issue having been raised in the bankruptcy court prior to the Chancery suit. Petitioner refers to the "record" in *Matter of Steelman* for these alleged facts. As has already been demonstrated, the matters contained in this ex parte pleading cannot be considered by this Court (see pp. 12-16, supra). This is especially true, since the facts to which petitioner desires to make reference occurred *prior* to September 21, 1936, when the petitioner swore to his affidavit (R. 16) in the bankruptcy court in support of his petition to restrain the prosecution of the Pennsylvania suit.

In note 20 on page 45 of petitioner's brief, he refers to certain stenographic minutes of the meeting of creditors held on June 19, 1936, and states that the minutes of this meeting were before the bankruptcy court when it granted the injunction herein, but were not incorporated by respondent in its record on appeal to the Circuit Court of Appeals. Petitioner thus seeks to have this Court take into consideration the facts alleged to be shown in the said stenographic minutes.

Neither these stenographic minutes nor any other stenographic minutes were before the bankruptcy court *upon petitioner's application for an injunction.* There is no reference to such stenographic minutes in (a) the trustee's petition (R. 2), (b) the trustee's affidavit (R. 9) attached to said petition, or (c) the decree granting petitioner's application for injunction (R. 31).

There is contained in the opinion of the bankruptcy court an allusion to stenographic minutes (R. 30). The bankruptcy court did not state in its opinion that the stenographic minutes were before it or had been considered by it. Certain stenographic minutes were before the bankruptcy court at the time, having been presented to it, not upon the petitioner's application for the injunction, but in connection with a different application then *sub judice* before the bankruptcy court in the bankruptcy proceedings. *In re Fox,* 16 F. Supp. 950. These stenographic minutes which were in the possession of the bankruptcy court on the other application referred to were *minutes of the § 21(a) examinations.* **The minutes of the first meeting of creditors,** in which the facts appear which are alleged to have created the issue, are contained in a separate volume and never were presented to the bankruptcy court in connection with petitioner's application for an injunction, or upon any other application before that court.

Since this contention of the petitioner was never raised in the bankruptcy court or in the Circuit Court of Appeals, it follows, as a matter of established procedure in this Court, that that contention cannot now be considered upon the argument in this Court. This Court has held that it will not consider points raised for the first time on certiorari (*Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, 380).

However, if this new point advanced by petitioner should be considered although predicated upon matters outside of the record, the references made by petitioner do not bear out his contention. To meet his argument respondent begs leave of this Court to refer to facts which are likewise outside the record, as this is respondent's only means of controverting petitioner's contention. He urges that at the first meeting of creditors on June 19, 1936, Capital Company objected to the claim filed by the respondent. The purpose of that first meeting was, of course, to elect a trustee. Every creditor's claim was at that time objected to by one or another creditor. Just as the Capital Company had objected to the claim of the respondent, so other creditors objected to the claim of the Capital Company, in an endeavor to defeat its right to vote for a trustee. However, that did not raise an issue as to the petitioner's contention that respondent is merely the alter ego of the bankrupt. The statement made by counsel for the Capital Company, reference to which is made at page 45 of petitioner's brief, contains an admission that respondent was wholly owned by the bankrupt's wife, viz:

> "The All Continent Corporation is wholly owned by the wife of the bankrupt, and its officers and directors are all members of the family or employees of the bankrupt."

This did not create an issue. On the contrary, it is a concession that respondent's assets do not belong to the bankrupt, but that they are the property of bankrupt's wife, who owns all of the capital stock of respondent.

Comment has already been made that in petitioner's petition, dated September 21, 1936, there is not the slightest reference to any such issue. In petitioner's brief, at page 36, he admits without qualification, that he has not filed any objections to respondent's proof of claim.

At pages 30 and 31 of petitioner's brief, he states that

> "The controversy between the trustee and All Continent as to the identity between All Continent and the bankrupt was presented to the bankruptcy court by (a) the filing of a proof of claim by All Continent, and (b) the conduct of examinations under § 21(a), which resulted in a referee's order directing the production of All Continent's books for audit along with those of the bankrupt, and a referee's report which strongly indicated the validity of the trustee's contention that All Continent is simply the *alter ego* of the bankrupt."

No such contention was made by petitioner when he applied for a summary order to compel respondent to turn over its books to petitioner for audit. On the contrary, petitioner's counsel stated on August 12, 1936, at the hearing before the referee on this application that there was no such issue. He said:

> "We are not asking your Honor to consider that All Continent is the bankrupt, or his alter ego. We are not asking your Honor to determine at this time, that the books of the All Continent Corporation are in reality, the books of Fox. We are, at the present moment, treating All Continent corporation as a separate entity; as one having had business transactions with the bankrupt over the period from its very inception, until now, and the

corporation which ultimately acquired the entire wealth of the bankrupt. * * *

"*Now, the question as to whether or not these are the books of All Continent Corporation; the question as to whether or not All Continent Corporation is a separate entity and a third party from the bankrupt, is not before you. That issue is not here raised.*" (Stenographic minutes on Referee's hearing on order to show cause, August 12, 1936, pp. 56, 57.) (Italics ours.)

The act of filing a claim in a bankruptcy court does not give that court jurisdiction over the claimant as to every issue that might possibly arise between claimant and trustee in bankruptcy. (*Daniel* v. *Guaranty Trust Co.*, 285 U. S. 154, 162.)

In *Edward Finch Co.* v. *Robie* (C. C. A. 8, 1926), 12 F. (2d) 360, cited at page 32 of petitioner's brief, issue was joined by the filing of written objections to the creditor's proof of claim by the trustee.

Even if an issue had been created by the objections filed by Capital Company at the first meeting of creditors, it necessarily must have been an issue *in personam*, did not refer to any specific *res*, nor is it contended by petitioner that any issue was raised in an *in rem* proceeding. Therefore, the pendency of that issue in the bankruptcy court could not have in any wise affected the right of the respondent to proceed with the *in rem* action which it instituted in Pennsylvania. (See *Penn General Casualty Company* v. *Pennsylvania*, 294 U. S. 189, 195.)

When is an issue made in relation to claims in bankruptcy? "An issue is a matter affirmed on one side and denied on the other." (*The Tordenskjold* [W. D. Wash., 1931], 53 F. [2d] 266, 267.) An issue is made when formal objections to a creditor's proof of claim are filed by a trustee in bankruptcy.

In *In re Noble* (W. D. N. Y., 1936), 15 F. Supp. 648, the referee in bankruptcy, on order to show cause on the application of the trustee in bankruptcy ordered two claimants (United States Government tax officials) to file a bill of particulars as to their respective claims. No objections had been filed by the trustee in bankruptcy to the allowance of each claim. Reversing the order of the referee, the bankruptcy court held:

> "• • • The ends of justice here especially require that the government should not be required to disclose the details of its evidence in support of the claims pending the filing of formal objections, at least, or *the trial of the issue raised by such objections* • • • " (p. 650). (Italics ours.)

In *In re Steinreich Associates, Inc.* (C. C. A. 2, 1936), 83 F. (2d) 740, the majority opinion stated: "Issue had been joined on the question of preferences • • • " (p. 741). In the dissenting opinion MANTON, C. J., stated the rule, uncontroverted by the majority, as to when issue is joined:

> "In the instant case, the claimant did not raise the issue of preference by filing his claim. The trustee's objections first raised that point" (p. 742).

Thus, it is clear that no issue concerning the identity of the respondent and the bankrupt was in the bankruptcy court prior to the commencement of the Pennsylvania suit. The fact that the claim had been filed and the further fact that examinations under § 21(a) of the Bankruptcy Act were conducted and the conclusion of the referee on a motion to have the respondent's books turned over to the petitioner for audit and examination, did not in any way create an issue within the judicially established meaning of that word.

Petitioner in Point II asserts that the facts in the petition before the bankruptcy court (R. 2) must be

deemed admitted by respondent's motion to dismiss the petition (R. 28).

"A motion to dismiss, like a demurrer, admits only facts well pleaded." (*Pacific States Box & Basket Co.* v. *White*, 296 U. S. 176, 185; *Arizona* v. *California*, 283 U. S. 423, 452.) On the other hand, conclusions, "• • • of the pleader, not being well-pleaded ultimate facts, are not held against the party interposing the demurrer, but are disregarded." (*Bishop & Co., Inc.* v. *Midland Bank* [C. C. A. 9, 1936], 84 F. [2d] 585, 587, certiorari denied, 299 U. S. —, 57 S. Ct. 111.)

The petition (R. 2) contains much "by way of argument, assertions as to questions of law together with inferences and conclusions of the pleader as to matters of fact. These are not deemed to be admitted by motion to dismiss. *Equitable Life Assurance Society* v. *Brown*, 213 U. S. 25, 43. *Southern Ry. Co.* v. *King*, 217 U. S. 524, 536. *Pierce Oil Corp.* v. *Hope*, 248 U. S. 498, 500." (*Missouri Pacific Railroad Co.* v. *Norwood*, 283 U. S. 249, 254.)

In *Equitable Life Assurance Society of the United States* v. *Brown*, 213 U. S. 25, this Court held:

> "As the questions in this case arise upon the defendant's demurrer to the bill of complaint, it is necessary to direct attention to the effect of a demurrer as an admission. We are not called upon to cite authorities for the statement that a demurrer only admits facts well pleaded in the pleading demurred to. *It does not admit the pleader's conclusions of law, nor does it admit the correctness of any opinion set forth in the bill*, as, for instance, in regard to the probable effect in the future of the continued control of the defendant by the interests existing therein up to 1906. Hence any construction placed by complainant upon the charter of the defendant and the insurance policy issued by the defendant to the complainant is not admitted, nor is the allegation of the ownership of the surplus by

> the policy holders as alleged by the complainant, nor any opinion which is expressed in the bill as to the ability of the defendant to continue business, *nor is any other opinion as to future happenings admitted by the demurrer*" (p. 43). (Italics ours.)

Therefore this Court should disregard all but actual facts appearing in the petition (R. 2).

In the recent case of *Foust* v. *Munson Steamship Lines*, 299 U. S. 77, in which a trustee in bankruptcy in a reorganization proceeding had successfully restrained a party from bringing an action at law pending proceedings under § 77B of the Bankruptcy Act (Act of Cong., June 6, 1934, c. 424, § 77B, 48 Stat. 912; 11 U. S. C. A. § 207), this Court, vacating the injunction order, held:

> "The burden of frank disclosure was upon the debtor and trustees. *Keystone Driller Co.* v. *General Excavator Co.*, 290 U. S. 240, 244. *Cf.* 2 High on Injunctions, 4th ed., § 1474." (299 U. S. 77, 86.)

This Court has also held:

> "Jurisdiction cannot be effectively acquired by concealing for a time the facts which conclusively establish that it does not exist." (*Lambert Run Coal Company* v. *Baltimore & Ohio Railroad Company*, 258 U. S. 377, at p. 382.)

The sole basis for the injunctive order obtained by petitioner from the bankruptcy court, was the claim that he was not ready, and could not be ready for a protracted period thereafter, to institute a plenary suit; that he was not ready and could not be ready to contest the question of ownership and the right to possession raised in the Pennsylvania suit. In his petition to the bankruptcy court he alleged:

> "15. By virtue of the proceedings last mentioned above, said All Continent Corporation is endeavor-

ing to force the trial of the issue of the ownership of property standing in its name concerning the real, true and bona fide ownership of which examination and investigation is now being made in orderly procedure under said Section 21-a of said Bankruptcy Act, by virtue of permission and leave granted by said order entered in this cause as aforesaid. To permit said All Continent Corporation to proceed with said litigation before said investigation and examination under Section 21-a of said Bankruptcy Act is concluded would require petitioner herein to enter upon the trial of the question of the ownership of the property and assets mentioned in said bill of complaint, copy of which is attached hereto, without such knowledge and information as might be gleaned from the orderly continuance of said 21-a examination and a complete examination and audit of the books of All Continent Corporation. From the facts and information which has come to the knowledge of the petitioner, he is strongly of the belief and opinion that All Continent Corporation and the bankrupt, William Fox, are one and the same, and he confidently believes that if the examination and investigation which is now being conducted under said Section 21-a of the Bankruptcy Act, as aforesaid, is permitted to proceed unhampered and unobstructed by the unlawful and improper acts and conduct of those persons subpoenaed to appear before this Court for examination, then it will be definitely and conclusively determined that said All Continent Corporation and said bankrupt William Fox are one and the same" (R. 7, 8).

The basis for obtaining the injunctive order against respondent was untrue because within one week after the making of the order and before the conclusion of the examinations under § 21(a) of the Bankruptcy Act there was served upon the respondent the bill of complaint in the plenary suit in the Chancery Court of the State of

New Jersey (R. 36). The length and detail of the bill of complaint (R. 36-66), the affidavit (R. 66-88), and the order to show cause (R. 88-90) served therewith, and the data contained therein, added to the fact that a petition for consent of the referee in bankruptcy had been submitted to the said referee (R. 36) and an order obtained on October 13, 1936 (R. 36), approving the commencement of the said plenary suit, make it all too clear that the sole ground upon which the injunction was asked, was not and could not be true and that petitioner did not disclose his true reasons to the bankruptcy court. Judging by the volume of the papers served in this plenary suit, it is a compelling inference that the papers were actually in the course of preparation at the time petitioner's plea was made to the bankruptcy court. Petitioner's claim that he could not proceed until the completion of the § 21(a) examination is, to say the least, a distortion of the facts as evidenced by his own subsequent conduct, since the § 21(a) examinations have not yet been concluded.

On its face it is apparent that the petition presented to the bankruptcy court was a palpable device to circumvent the jurisdiction of the District Court for the Eastern District of Pennsylvania, and to interfere with its authority and power to determine the ownership of the *res* involved in that suit.

The Capital Company which is one of the two active creditors in this bankruptcy proceeding (R. 3), likewise contested the jurisdiction of the District Court for the Eastern District of Pennsylvania by a motion to set aside the service of process upon it (R. 100). It is clear that both the Capital Company and petitioner have attempted to prevent any adjudication of the merits in the Pennsylvania suit.

Respondent respectfully submits that petitioner did not frankly disclose all the facts to the bankruptcy court as he

was required to do (*Foust* v. *Munson Steamship Lines*, 299 U. S. 77, 86).

Had the petitioner informed the bankruptcy court that there was no issue in that court and had he shown that he was contemplating and preparing a bill of complaint and affidavit for a plenary suit against respondent to try the same issue that was already before the Pennsylvania court, the bankruptcy court would have seen immediately that it did not have power to enjoin the respondent herein. The Circuit Court of Appeals, on the other hand, having the full picture before it, was able to see what the petitioner had attempted to do. It held that in view of all the facts the bankruptcy court did not have power to enjoin (R. 106).

Petitioner claims at page 31 of his brief that if the admitted facts are insufficient to justify the injunction order (R. 31), "it must be because a bankruptcy court can never issue an injunction other than in protection of a specific property *res* in its possession." In this petitioner admits that the true rule is as submitted by the respondent; viz, that the bankruptcy court only has power to protect a *res* within its possession. He is herein attempting to have this Court extend the rule beyond its previous scope though he admits he knows "of no case in this Court directly in point" (petitioner's brief, p. 31) which would sanction a departure from this well-established rule.

The cases cited by petitioner do not in any way support his contention. Respondent does not dispute the holdings in *Meyers* v. *International Trust Company*, 263 U. S. 64, *Local Loan Co.* v. *Hunt*, 292 U. S. 234, and *Whitney* v. *Wenman*, 198 U. S. 539. These cases are irrelevant.

The rule of *Meyers* v. *International Trust Company*, 263 U. S. 64, does not support petitioner's contention. The holding therein is that a fact determined by a referee in bankruptcy in "what was equivalent to a hearing in

equity" (p. 72) on an issue created by the filing of a specification pursuant to General Order XXXII, provided for by § 30 of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, § 30, 30 Stat. 554, 11 U. S. C. A., § 53), in opposition to an application to confirm a composition, is binding on the parties actually litigating the issue. This is but an instance of a doctrine applied to all judicial proceedings. This rule of estoppel by judgment would likewise apply to any determination of the issues raised in the Pennsylvania suit. Furthermore, as in *Local Loan Co.* v. *Hunt*, 292 U. S. 234, the bankruptcy court had *in rem* jurisdiction.

Bronx Brass Foundry Co. v. *Irving Trust Company*, 297 U. S. 230, does not stand for the proposition asserted by petitioner. It rests solely on the applicability of Equity Rule 2 of the United States District Court for the Southern District of New York, which, as applied by this Court to bankruptcy proceedings, prevents the withdrawal of a claim *after issue joined*. (Compare *Jones* v. *Securities & Exchange Commission*, 298 U. S. 1, 21.) In the *Bronx Brass Foundry* case, supra, issue had been raised by the creditor's denial of the trustee's allegations of preference on a motion of the trustee to expunge the creditor's claim (297 U. S. 230, 231).

Respondent need not discuss the inapplicability of *Alexander* v. *Hillman*, 296 U. S. 222, because petitioner admits that § 68 of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, § 68, 30 Stat. 544, 565, 11 U. S. C. A., § 108) does not permit the rule of *Alexander* v. *Hillman* to be pressed as far as petitioner would desire (petitioner's brief, p. 37). However, *Alexander* v. *Hillman* does not stand for the proposition that petitioner asserts, i.e., that "Under that rule, the mere filing of the claim would vest the bankruptcy court with jurisdiction over all issues between the claimant and the trustee" (petitioner's

brief, pp. 36, 37). On the contrary, the facts in that case disclose that the issue involved was raised by the affirmative step of the receiver who filed an ancillary bill against the claimant in which he sought affirmative relief (296 U. S. 222, 235, 238).

Likewise, in *In re Steinreich Associates, Inc.* (C. C. A. 2, 1936), 83 F. (2d) 740, cited by petitioner at page 35 of his brief, "Issue had been joined on the question of preferences • • • " (p. 741), by the filing of formal objections by the trustee.

Petitioner admits that he has "not yet filed his formal objection" (petitioner's brief, p. 36).

Finally, in support of his position, petitioner relies on *Continental Illinois Bank and Trust Company* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S. 648, stating that this case appears to be determinative of the instant question. Respondent has heretofore distinguished the *Continental Bank* case from the instant one (see pp. 31-32, supra), and does not controvert the principle that the bankruptcy court has "power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction" but respectfully submits that petitioner in no way establishes that the bankruptcy court in the instant cause had jurisdiction of any *res* or *issue* sufficient to prevent the Pennsylvania suit against petitioner.

Petitioner's discussion of examinations pursuant to § 21(a) of the Bankruptcy Act indicates that he has misconstrued the nature of the proceedings before the referee. Such examinations are not proceedings in which issues of fact are tried. They are merely inquiries in which the creditors (R. 3) may examine persons as to matters pertinent to the bankruptcy proceedings. They involve no trial. Respondent has never had an opportunity to offer evidence in support of its position. Petitioner's conclusions from the evidence given at the § 21(a) exam-

inations seem to be that respondent "very likely has no interest at all" (petitioner's brief, p. 38) in the assets involved in the Pennsylvania suit, yet he never commenced a summary proceeding to get possession of the assets. The plenary suit commenced by the bill of complaint (R. 36) in the Chancery Court of New Jersey is evidence of the fallacy of petitioner's position. The only conclusion to be drawn from petitioner's bill of complaint (R. 36-47) is that the § 21(a) examinations established the substantiality of respondent's adverse claim.

At page 43 of his brief, petitioner states: "The trustee's plenary suit raised every issue between All Continent and the trustee." If this be so, respondent submits that the issues raised therein were raised *for the first time* in that plenary suit, and this a month after the Pennsylvania suit had been commenced.

At page 51 of his brief, petitioner deliberately ignores the true factual background in this case and attempts to convict an officer, and an employee of the respondent, of contempt of court before any District Judge has adjudged them in contempt. Respondent's president was cited for contempt (R. 6). However, *she has never been adjudged guilty of contempt.* Although the facts nowhere appear in the record and are only found in the brief of petitioner, after months of testifying, an employee of respondent was cited for contempt. *He, likewise, has never been adjudged in contempt.* Hence, it is respondent's duty to controvert the language of the petitioner when he says, at page 51 of his brief, "Once the officers of the respondent have ceased to be in contempt and have tendered their evidence and their books, • • •."

It is, of course, beyond the power of the referee to adjudge a witness in contempt, such power having been given by § 41(b) of the Bankruptcy Act (Act of Cong., July 1, 1898, c. 541, § 41, 30 Stat. 556, 11 U. S. C. A.,

§ 69[b]) to the District Judge, and one which only the District Judge may exercise. As the District Judge has never adjudged either of the parties mentioned by petitioner to be in contempt, it is unfair and unwarranted for the petitioner to use the language he does.
~~tioner's brief, p. 37).~~

POINT III

The petitioner is a proper party defendant in the Pennsylvania suit.

Petitioner, at page 6 of his brief, mentions the fact that he was made a party defendant in the Pennsylvania suit without leave of the bankruptcy court. However, in no part of his brief does he cite any authority to the effect that leave of the bankruptcy court is a condition precedent to a suit properly instituted, in other respects, against a trustee in bankruptcy. Indeed, it would be impossible for him to do so in view of the state of authorities.

As the *res* is not within the control of the bankruptcy court and the Pennsylvania court has jurisdiction over it, the respondent properly joined the petitioner as a party defendant to cut off his rights (*Remington on Bankruptcy* [4th Ed.], Vol. 5, Sec. 2331, p. 477). Leave of the bankruptcy court is not requisite before joining the petitioner as a party defendant where affirmative relief is not sought against him (*Remington on Bankruptcy* [4th Ed.], Vol. 5, Sec. 2336, p. 486; *Fort Dearborn Trust & Savings Bank* v. *Smalley* [C. C. A. 8, 1924], 298 Fed. 45, 49; *In re Smith* [S. D. N. Y., 1903], 121 Fed. 1014; *Duncan* v. *Fox* [S. D. Fla., 1924], 300 Fed. 165; *Massachusetts Mutual Life Insurance Co.* v. *Grossman* [S. D. N. Y., 1933], 4 F. Supp. 990; *In re Barber* [S. D. N. Y., 1934], 7 F. Supp. 806).

These cases determine that where the property in question is not in the possession of the bankruptcy court and the suit cannot mature into any charge on the assets of the bankrupt estate, being only an invitation to come in and get more assets if the trustee be entitled thereto, leave of the bankruptcy court to make the trustee a party defendant is unnecessary. Since leave is not necessary, the bankruptcy court is without power to restrain the joinder of the petitioner as a party defendant.

The Pennsylvania suit is clearly not an attempt to deprive the bankrupt estate of assets. It merely extends to the petitioner an invitation to establish his right to assets. In it respondent seeks no affirmative relief against petitioner nor any decree as to property actually or constructively in his possession.

Consequently there is no merit to the statement that no leave from the bankruptcy court had been granted the respondent prior to the service of process in the Pennsylvania suit upon the petitioner pursuant to § 57 of the Judicial Code.

POINT IV

Dicta cannot be prejudicial to the petitioner.

In the instant case the recital, in the opinion of the Circuit Court of Appeals (R. 101-106), of the facts and conclusions leading up to its decision were wholly justified. As stated in the beginning of this brief, at page 17, there is but one question before this Court, namely, the justification for the *decision* of the Circuit Court of Appeals. That was the only question presented by petitioner in his petition for the writ of certiorari granted herein. However, in his brief on certiorari, petitioner presents an additional question concerning the justifica-

tion of the alleged dicta in the *opinion* of the Circuit Court of Appeals. This Court has held that "The only question for consideration is that stated in the petition for writ of certiorari. *Gunning* v. *Cooley*, 281 U. S. 90, 98." (*Helvering* v. *Taylor*, 293 U. S. 507, 511.) Therefore, no consideration should be given to petitioner's Point III.

Petitioner's application to have this Court review and modify the *dicta* of the Circuit Court of Appeals is without precedent.

Respondent is not to be deprived of a vested right to prosecute its Pennsylvania suit because of alleged dicta in the opinion of the Circuit Court of Appeals. If, as respondent contends, the bankruptcy court was without power to enjoin the prosecution of respondent's Pennsylvania suit, it would be an unwarranted penalty for this Court to deprive respondent of its rights merely because the Circuit Court of Appeals in its opinion may have gone beyond the precise issue presented to it.

However, respondent would be remiss if it neglected to point out facts justifying the opinion of the Circuit Court of Appeals. In doing so, respondent does not waive its right to have the Court refuse to pass upon the question relating to the opinion of the Circuit Court of Appeals in view of the case of *Helvering* v. *Taylor*, supra. The alleged dicta as identified and numbered by the petitioner will be treated seriatim.

1. The Circuit Court of Appeals stated that a cloud had been created on respondent's title to the assets in the Sparks account as a result of the issuance of the subpoena by the Capital Company. Although mentioning this as alleged dicta, petitioner apparently finds no fault except to admit that the question is open to substantial doubt. We earnestly submit that the opinion of Judge

LEARNED HAND of the Circuit Court of Appeals for the Second Circuit, in *Capital Co.* v. *Fox,* 85 F. (2d) 97, demonstrates that J. W. Sparks & Co. were put in jeopardy by being forced to determine whether the assets belonged to respondent or were subject to some claim on the part of the creditors of William Fox. Therefore, the position taken by Sparks & Co. in refusing to deal with respondent (R. 95) is readily understandable. The existence of the cloud can best be seen from the answer interposed in the Pennsylvania suit by J. W. Sparks & Co. (R. 91-99). This answer definitely concedes the existence of the cloud (R. 22, 95).

2. The second claimed dicta is that the Pennsylvania Court is the only court that can remove the cloud upon the title to the securities. The suggestion of petitioner that the District Court for the Southern District of New York could have aided the respondent is untenable. That court could not have affected the rights of petitioner, since he could not be made a party to any suit pending in that court. It was necessary to go where the *res* was located to get jurisdiction over the petitioner. The inadequacy of any forum other than the Pennsylvania Court is more fully discussed, supra, on page 9.

3. The third alleged dicta is the statement in the opinion of the Circuit Court of Appeals that the controversy in the plenary action filed by petitioner in the Court of Chancery of New Jersey in October of 1936, so far as All Continent Corporation is concerned, is substantially the same controversy that is involved in the Pennsylvania Court. Petitioner admits this fact at page 8 of his brief, wherein he states that the assets sought by petitioner in the plenary suit included the assets in the Pennsylvania suit. The issue as to these assets is identical to the issue as to all of the assets.

4. As to the alleged dicta concerning separable controversies, it may be said: (a) Contrary to the statement of the petitioner, the argument by respondent's counsel in the Circuit Court of Appeals did include an analysis of the bill of complaint in the plenary suit and that analysis of necessity separated the controversies and issues as the Circuit Court of Appeals later found them. (b) The opinion of Vice-Chancellor Sooy in the New Jersey Chancery Court on the application to remove the cause to the Federal Court (*Steelman* v. *All Continent Corporation, et al.*, 121 N. J. Eq. 218), which nowhere referred to the opinion of the Circuit Court of Appeals, clearly demonstrates that both respondent's counsel, in argument, and the Circuit Court of Appeals, in its opinion, were correct. (c) It is interesting to note petitioner's statement that dicta in an opinion of the Circuit Court of Appeals may have an effect on the District Court because that court knowing its other decisions in other cases will be subject to review by the same Circuit Court of Appeals, might hesitate to make a decision contrary to a dicta by the Appellate Court. That reasoning is both an unnecessary and unwarranted reflection on the District Court and the Circuit Court of Appeals.

5-6-7. These alleged dicta are to the effect that the trustee, to establish his ownership of respondent's property, including the securities in the possession of J. W. Sparks & Co., must prove all of his averments in the bill in the Chancery Court which relate to the assets of respondent and that an adjudication in Pennsylvania would be binding on respondent everywhere. It is perfectly obvious that petitioner, to succeed in his claim to the securities in the possession of J. W. Sparks & Co., must of necessity prove that he is entitled to part, as well as all, of the assets of respondent.

At page 8 of petitioner's brief, it is asserted, "The assets sought in this action [referring to the plenary suit] included not only the securities involved in the Pennsylvania suit, but all of the other assets held in the name of All Continent • • • ". This is an admission that respondent's securities in the Sparks account are in part, the identical *res* which is sought to be recovered in the plenary suit. Nowhere is there a single suggestion that the issue of the true ownership of the assets in the possession of J. W. Sparks & Co. would involve a single fact different from, or in addition to, facts which petitioner would need to prove in support of his allegations in the bill of complaint in his plenary suit insofar as they affect the assets of respondent.

8. As indicated in Point II, supra, pages 36-55, the United States District Court for the Eastern District of Pennsylvania did acquire exclusive jurisdiction of the controversy relating to the ownership of the securities in the account with J. W. Sparks & Co. The Pennsylvania court, having first acquired jurisdiction of the property in controversy is entitled to maintain exclusive jurisdiction until the issue is terminated. The Circuit Court of Appeals was merely expressing the general rule which this Court has so often reiterated as necessary to preserve harmony among the courts of different jurisdictions. (*Penn General Casualty Co.* v. *Pennsylvania*, 294 U. S. 189, 197; *Harkin* v. *Brundage*, 276 U. S. 36, 43; *Palmer* v. *Texas*, 212 U. S. 118, 129; *Farmers Loan & Trust Company* v. *Lake Street Elevated Railway Co.*, 177 U. S. 51, 61.)

In *Fort Dearborn Bank* v. *Smalley* (C. C. A. 8, 1924), 298 Fed. 45, the Circuit Court of Appeals therein likewise properly discussed the exclusive control of property in an analagous case and likewise there determined that because another court had exclusive control of the *res* the petition

of the trustee in bankruptcy to enjoin the suit in the other court must be vacated (see pp. 22-26, supra).

9. The next alleged dicta is that respondent is "entitled to maintain the exclusive jurisdiction which it thus acquired under the authority of § 57 of the Judicial Code and may, upon proper application, restrain the trustee from litigating the controversy elsewhere" (petitioner's brief, p. 58).

Petitioner overlooks the use by the Circuit Court of Appeals, of the words, "upon proper application". Respondent here reiterates the position that the application which it did make to maintain the Pennsylvania court's exclusive jurisdiction was proper. Apparently the Pennsylvania court agreed. Whether the Circuit Court of Appeals on an appeal will agree with the Pennsylvania court's order is undetermined. If petitioner contends that the application to maintain its exclusive jurisdiction, which was made to the Pennsylvania court, was improper, it is petitioner's prerogative to test that out in the usual, normal and orderly manner by appeal which he has perfected.

10. Petitioner also finds fault with the statement of the Circuit Court of Appeals that "The Capital Company had been and is seeking to get these securities not for the creditors as a whole but for itself". Here, the concerted action of petitioner and Capital Company becomes most apparent. Counsel for the Capital Company appears as one of the attorneys of record for the petitioner in this proceeding.

In the answer filed by the Capital Company in the Pennsylvania suit, the contention is raised that the Capital Company and the receiver appointed exclusively for it in the United States District Court for the Southern District of New York has become vested with absolute title

to the interest of William Fox in the securities in the Sparks account. This is necessarily exclusive of and superior to the rights of petitioner. It is furthermore admitted in petitioner's brief, at page 60, that Capital Company has asserted its position in the bankruptcy court as well as in the Pennsylvania suit.

11. The Circuit Court of Appeals stated in effect that the petitioner should defend the Pennsylvania suit. The Circuit Court of Appeals has as much power and right to direct a trustee in bankruptcy as to the scope of his duties as any District Court sitting as a court of bankruptcy. Other Circuit Courts of Appeal have done so and likewise District Courts have denied injunctions petitioned for by trustees in bankruptcy and ordered the trustees to appear and defend suits in other jurisdictions.

In *Duncan* v. *Girand* (C. C. A. 5, 1921), 276 Fed. 554, reversing a decree of the District Court which had enjoined a suit in a State court in which the trustee in bankruptcy had been made a party defendant, the Circuit Court of Appeals stated: "We are of opinion that appellee [trustee in bankruptcy] should submit his rights to the state court" (p. 556).

In *In re Worall* (C. C. A. 2, 1935), 79 F. (2d) 88, fifty days before Worall filed a voluntary petition in bankruptcy, his membership in the New York Stock Exchange was sold, the proceeds of which the exchange held ready to turn over to any party entitled thereto. The sale was caused by the exercise of an option held by one of Worall's partners, a Mrs. Rubin. She claimed the amount as liquidator under the partnership agreement. Worall started suit in the Supreme Court of New York, to dissolve the partnership and for the appointment of a receiver. Worall's former wife commenced sequestration

proceedings to enforce alimony payments, in which the appellee, Heyman, had been appointed receiver and in which proceedings Worall and all other persons possessing his property were restrained from transferring it. Mrs. Rubin commenced an action in the Supreme Court of New York against the New York Stock Exchange for money had and received to recover the proceeds of the sale of the seat, whereupon Worall filed his voluntary petition in bankruptcy. After his appointment, the trustee in bankruptcy applied to the bankruptcy court to restrain the plaintiffs from proceeding in each of the three New York actions and for an order directing the New York Stock Exchange to turn over the proceeds to the trustee in bankruptcy. The District Court denied the motion of the trustee in bankruptcy and on the other hand *ordered* the trustee to appear in the action brought by Mrs. Rubin against the Stock Exchange having "decided that the proceeds were not in the actual or constructive possession of the bankrupt or the latter's trustee" (pp. 89, 90). The Circuit Court of Appeals affirmed the order below.

In *Heath* v. *Shaffer* (N. D. Iowa, 1899), 93 Fed. 647, a suit in equity in the State court was commenced by chattel mortgagees against the bankrupt corporation (the mortgagor) and its trustee in bankruptcy. Thereupon, the trustee in bankruptcy filed a bill of equity in the United States District Court to restrain the chattel mortgagees from further prosecuting the State court suit to foreclose the mortgage. Denying a motion for a preliminary injunction, the court held:

> "He [trustee in bankruptcy] should appear in the state court, and, by pleading the adjudication in bankruptcy and his appointment as trustee, lay the foundation for the protection of his rights. If

> he questions the jurisdiction of the state court, he can plead thereto in proper form. • • • If he wishes to contest the validity or extent of the adverse claim asserted by the plaintiff in the state court, he can do so by answer or cross bill. • • • In some of the discussions had upon this general subject, it seems to be assumed that the state courts cannot aid in carrying out the general provisions of the bankrupt act, and that the trustee can only appeal to the courts of bankruptcy when seeking to secure a disposition of the bankrupt's estate under the act; but this is a mistaken view of the law. The state courts, in all proceedings pending before them, have the right to apply and enforce the provisions of the bankrupt act in the determination of the questions at issue before them, and can give full protection to the rights of the trustee. The bankrupt act is the law of the land, and the state courts have full right to enforce its mandate in all proceedings properly before them. • • • What is meant is that in all suits pending before them, wherein it may be involved a contest between the trustee and a third party, which depends, in whole or in part, upon the provisions of the bankrupt act, the state courts must, of necessity, have full right and jurisdiction to apply and enforce the provisions of the bankrupt act, not only in deciding the question of right at issue, but in securing to the parties the proper protection accorded to them under the act • • •" (pp. 649, 650).

This statement by the District Court sums up the respondent's contention. A fortiori, a Federal court will protect the petitioner's rights. Petitioner will lose no rights in the Federal court in Pennsylvania which he would be entitled to in either the State or Federal court in New Jersey and there is no reason whatsoever why, because he is a trustee in bankruptcy, and not another person, he should be immune from the effect of proper process issued pursuant to § 57 of the Judicial Code and issued out of the United States District Court

for the Eastern District of Pennsylvania. The Circuit Court of Appeals was justified in its statement.

In any event, expressions found in the opinion of the Circuit Court of Appeals which may go beyond the points involved do not come within the rule of *stare decisis*. (*Humphrey's Executor* v. *United States*, 295 U. S. 602, 626), and do not control judgments in subsequent suits. (*Harriman* v. *Northern Securities Co.*, 197 U. S. 244, 291.) In the most recent opinion of this Court, *Brush* v. *Commissioner of Internal Revenue*, — U. S. —, — (decided March 15, 1937), the Court again reiterated this proposition, stating:

> "Expressions of that kind may be respected, but do not control in a subsequent case when the precise point is presented for decision. Osaka Shosen Kaisha Line v. United States, 299 U. S. —, — (February 1, 1937), and authorities cited." [United States Law Week, March 16, 1937, at p. 6.]

Consequently, dicta, if any be found, cannot be prejudicial to the petitioner.

CONCLUSION

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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P. C

SUPREME COURT OF THE UNITED STATES.

No. 638.—October Term, 1936.

Hiram Steelman, Trustee in Bankruptcy of William Fox, a Bankrupt, Petitioner, *vs.* All Continent Corporation, Respondent.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[April 26, 1937.]

Mr. Justice Cardozo delivered the opinion of the Court.

The question is one as to the power of a court of bankruptcy, in the situation developed in the record, to enjoin the prosecution of a suit in another federal court upon the ground that the suit, if pressed to a decree, may thwart an inquiry into frauds charged against the bankrupt, or make relief against them difficult.

William Fox was adjudicated a bankrupt on May 29, 1936, in the United States District Court for the District of New Jersey. On the petition of two creditors an order was made under section 21a of the Bankruptcy Act (11 U. S. C. § 44a) for the examination of All Continent Corporation (a Delaware corporation), its president Eva Fox, who was also the bankrupt's wife, his daughters, and other witnesses. The wife refused to submit to examination, and was cited for contempt. When this record was made up, the proceeding to punish her was still undetermined. Meanwhile the examination proceeded with the aid of the witnesses responding to the order. After seventeen or more hearings the Referee made an order on August 18, 1936, whereby All Continent Corporation was directed to deliver all its books and records to the trustee in bankruptcy (petitioner in this court) for examination and audit. As a basis for the order, which was confirmed by the court with unimportant changes (*In re Fox*, 16 F. Supp. 950), the Referee certified the facts as they had been developed through the evidence before him. By this it appeared that All Continent Corporation was the creation of the bankrupt himself, who had supplied every dollar of its capital; that in doing this he had divested himself of a substantial portion of his property; that the entire capital

stock, then claimed by his wife, had been kept in his name upon the corporate books; that he had retained in his possession and under his control the assets of the corporation, made up of securities, and had dealt with them on many occasions as if they were his own; that he held a power of attorney, broad in its terms, authorizing him to act for the corporation in the transaction of its business; that such books and records as were already in evidence disclosed disbursements for his account, discrepancies between the entries and those in his private books, and also erasures, corrections and interlineations affecting the scrutinized transactions, as well as sales to the corporation on the eve of bankruptcy. In the view of the Referee, this chain of facts, combined with many others in the testimony before him, was proof "that the affairs of the All Continent Corporation were so related to and intertwined with the property and affairs of the bankrupt" as to show the need for an exhaustive examination and audit of all the documents available.

The enforcement of the order for the production of the books and records was stayed by the District Court until September 9, 1936. On that day the trustee was served in New Jersey with a subpoena and bill of complaint in a suit in the United States District Court for the Eastern District of Pennsylvania. The complainant named in the bill was the All Continent Corporation, which had already filed a proof of claim against Fox in the bankruptcy proceeding; the defendants were the members of the partnership of J. W. Sparks & Company, with whom were joined as absentee defendants, Capital Company, a corporation, and the petitioner in his capacity as trustee of the estate. The suit was brought under section 57 of the Judicial Code (28 U. S. C. § 118) to remove a cloud upon the title to personal property claimed by the complainant. The trustee not being "an inhabitant of or found within" the district of the suit, an order directing him to plead was served upon him in New Jersey after the service of the bill. Judicial Code, § 57; 28 U. S. C. § 118. The cloud to be removed had its origin in a third party subpoena issued out of a federal court in New York in proceedings supplementary to judgment. Capital Company, a corporation, had recovered a judgment against Fox before he became bankrupt. A proceeding supplementary to judgment was begun, and we know from our records that Fox refused to appear and was fined for contempt. *Fox* v. *Capital Company*,

299 U. S. 105. In aid of the same judgment, a third party subpoena was served upon Sparks & Co., stockbrokers residing in Philadelphia and there engaged in business. These brokers had upon their books an account in the name of All Continent Corporation, in which Fox was believed to have an interest as owner. The securities held in that account had a value in excess of half a million dollars, subject to a debit balance. To enable the judgment creditor to reach any equity in those securities belonging to the debtor, the subpoena served upon the brokers was accompanied by a notice, which in effect was an injunction (New York Civil Practice Act § 781), restraining them from disposing of the property of William Fox until the further order of the court. The validity of the injunction, though challenged by the brokers, was upheld upon appeal. *Capital Co.* v. *Fox*, 85 F. (2d) 97. Because of that restraint, Sparks & Co. refused to permit any securities to be withdrawn from their custody or otherwise disposed of, having notice of the claim that, irrespective of the form of the account, the securities belonged to Fox. Anxious to resume the control of the securities, All Continent Corporation sued in Pennsylvania to establish title to the *res*. Capital Company was stated in the bill to have created a cloud upon the title by issuing the third party subpoena with the accompanying injunction. The trustee in bankruptcy was stated to have helped to create the cloud by joining with Capital Company in a request that the subpoena be continued after the bankruptcy petition. Relief was demanded decreeing All Continent Corporation to be the owner of the securities and entitled to possession upon payment of the debit balance owing to the brokers.

The trustee in bankruptcy upon service of the bill of complaint petitioned the court of bankruptcy that it stay the prosecution of the suit in Pennsylvania. The petition for a stay was granted. The opinion of the District Judge (16 F. Supp. 949) states that a grave question has arisen as to the ownership of the assets and shares of All Continent Corporation. Litigation as to such ownership "ought to be conducted by trustee after there has been a full and complete disclosure of the facts in the 21 (a) examinations." "To require the trustee to appear and defend that suit [i. e., the suit in Pennsylvania] . . . would interfere materially with proper administration." Further prosecution against him was accordingly restrained.

From that decree All Continent Corporation appealed to the United States Circuit Court of Appeals for the Third Circuit. By consent of the parties the court made an order including three additional documents in the transcript of the record: (1) the bill of complaint in a suit in the Court of Chancery in New Jersey; (2) an order to show cause for an injunction *pendente lite* and the appointment of a receiver; and (3) the answer of Sparks & Co. in the suit in Pennsylvania. The suit in the New Jersey Chancery was brought by the trustee in bankruptcy against the bankrupt William Fox, his wife, his daughters, his grandchildren, and the All Continent Corporation. The bill was filed within a week from the date of the restraining order. It charges fraud in the transfer of securities and other assets to the corporation at the time of its creation and also at later dates. It charges fraud in the assignment of the shares of the corporation by Fox to his wife, partly for her own benefit and partly for the benefit of children and grandchildren. It charges fraud in the opening of accounts with stockbrokers, ostensibly for the use of the corporation itself, but really for the use of Fox alone. All these transactions are stated to have occurred in execution of a unitary scheme, to which Fox, his wife and children and the corporation were parties in its several manifestations, for the hindrance of creditors in the enforcement of their rights and remedies. A decree is prayed enjoining the corporation from disposing of its assets, appointing a receiver to manage and preserve them during the pendency of the suit, annulling all the transfers tainted by the fraud, and decreeing a trust for the benefit of the bankrupt and through him for the trustee. Upon the filing of the bill the Chancellor made an order to show cause why a receiver should not be appointed, and he enjoined in the interim any transfer of the assets. One other document, as we have indicated, was added to the transcript. This was the answer of Sparks & Co. in the suit in Pennsylvania. In that answer they state the acceptance of securities from All Continent Corporation without notice that Fox or others had any interest therein; the existence of a debit balance of $308,764.97; the readiness of the customer to pay the debit balance on the return of the securities; and the hardship to the brokers involved in continuing the account with all the risks incidental to future changes in the market.

Upon the record thus supplemented the Court of Appeals considered the appeal. 86 F. (2d) 913. It said that "the real question in issue here is whether or not the New Jersey court [i. e., the court of bankruptcy in New Jersey] had the power to enjoin the appellant from prosecuting its suit, under the facts in this case, in the Pennsylvania court." It ruled that "the Pennsylvania court, having first acquired jurisdiction of the property and controversy, is entitled to exclusive jurisdiction, and the institution of the suit in chancery was an attempt to oust the Pennsylvania court of the jurisdiction which it had previously and validly acquired." It coupled that ruling with the statement that the corporation would be entitled "upon proper application" to "restrain the trustee from litigating the controversy elsewhere." It found in the suit in the New Jersey Court of Chancery two separable controversies, one between the trustee and All Continent Corporation, the other between the trustee and the members of the Fox family, the corporation being stated to be the only necessary party defendant to the first controversy and the Fox family the only necessary parties defendant to the other. It concluded that upon the facts exhibited "the District Court of New Jersey did not have the power to restrain the suit which the statute clearly authorized to be brought in the Pennsylvania court." The decree of the court of bankruptcy was accordingly reversed. The question of power being important, we granted certiorari.

All Continent Corporation, if there is truth in the charges made by the trustee, is a party to a conspiracy to cover up the bankrupt's assets and keep them from his creditors. In that view of the facts, the suit in Pennsylvania will be a step in fulfilling the conspiracy, and may even crown it with success. The inquiry into the fraud, an inquiry going forward in orderly fashion under the supervision of the court of bankruptcy, will be transferred to another jurisdiction with the supposed fraudulent grantee as *dominus litis*. In such a suit there is danger that the issues to be tried may be so narrowly restricted as to shut out the light. All Continent Corporation may be shown to have the legal title to the securities in the keeping of its brokers. If so, it may be adjudged in a controversy with the brokers to be entitled to possession, though its own shares are subject to a secret trust for the benefit of the bankrupt. There will be

an absence of the parties without whom the adjudication of such a trust will be indecisive and perhaps impossible. If assignments of the shares have been made by the bankrupt to his wife for his own use or for hers or for the use of children and other relatives, the invalidity of such assignments may not be open to decision unless the assignees of the shares are brought before the court. Choses in action and other equitable assets, even though fraudulently transferred, are not subject at common law to seizure under execution at the instance of a creditor, but must be avoided by a decree in equity. *Stephens* v. *Cady*, 14 How. 528, 531; *Freedman's Savings & Trust Co.* v. *Earle*, 110 U. S. 710, 712; *Anthony* v. *Wood*, 96 N. Y. 180, 185; *American Surety Co.* v. *Conner*, 251 N. Y. 1, 5, 6. The need for a decree is no less obvious and settled when title is to be reclaimed at the suit of a trustee. There are times, it is true, when a trustee may have the benefit of a summary order for transfer or surrender, but this will never happen as to property out of his possession unless the adverse claim of title is colorable only. *Taubel Co.* v. *Fox*, 264 U. S. 426, 431, 433, 434; *May* v. *Henderson*, 268 U. S. 111, 115; *Galbraith* v. *Vallely*, 256 U. S. 46, 50; *Taylor* v. *Sternberg*, 293 U. S. 470, 473. Quite as much as any creditor, the trustee may thus be helpless to vindicate his equities in the suit in Pennsylvania, the parties being what they are. Other difficulties will remain if these can be surmounted. The bankrupt's wife may absent herself from the trial, just as she has refused to submit to examination in the bankruptcy proceeding, with the result that the investigation of the equities may be partial or abortive. Other witnesses may do the like. The danger of frustration by such means will be much greater in a suit by All Continent than in one by the trustee, an officer of the court. In the end a fraudulent grantee may gain possession of the securities with power to distribute them among the members of the bankrupt's family, and to do this, moreover, under cover of a decision which will breed confusion and uncertainty in other suits to follow.

All these embarrassments and obstacles will be removed at a single stroke if the bankruptcy court is free from vexatious interference in its task of supervising and controlling the administration of the assets. The facts may then be uncovered without haste or impediment by continuing the examination under § 21a. A plenary suit may be brought with the trustee in control to ascer-

tain the legal and the equitable interests in All Continent's assets and also in its shares of stock. All persons whose interests will be affected by an appropriate decree, and particularly the members of the bankrupt's family, adverse claimants to the shares, may be joined as defendants, as indeed they have been joined already in the New Jersey Court of Chancery. To avoid the fraudulent or improvident exercise of dominion by the holder of the legal title, an injunction may be granted restraining the transfer of the assets until the issues have been determined. To avoid loss or hardship either to stockbrokers or to others by tying up accounts without opportunity for release a receiver may be appointed with power to manage such accounts and preserve the assets generally. All these forms of relief and others ancillary thereto will be well within the powers of a court of equity if a suit is maintained in the name of the trustee with the corporation, the bankrupt and his family parties to the record. The suggestion will not hold that the controversy between the trustee and the corporation has no connection with the controversy between the trustee, the bankrupt and his relatives. Cf. *Graves* v. *Corbin*, 132 U. S. 571. On the contrary, the remedy against the bankrupt and his relatives is likely to be truncated and inadequate unless accompanied by an injunction and a receivership which will bind the corporation, its officers and agents. The suit in the New Jersey Court of Chancery, which the court below has erroneously characterized as one that should be restrained because brought after notice of the suit in Pennsylvania, will supply an appropriate and convenient medium for the litigation of these issues if it is permitted to go forward.

The decision under review, which gives free rein to the prosecution of the suit in Pennsylvania, is built on the assumption that in the circumstances exhibited there is no power to apply a curb. The court has not found that discretion was abused or improvidently exercised if power was not lacking. This is plain from the opinion. It is made plainer, if that be possible, by the argument of counsel for the corporation, the respondent in this court, disclaiming any effort to uphold the decision in his favor in the absence of defect of power. With the controversy thus narrowed the path is cleared to a conclusion. For reasons already indicated there was probable cause for the belief that the suit in Pennsylvania would be a step in the execution of a fraudulent conspiracy, impeding and perhaps frustrating the administration of the assets. There was probable

cause for the belief that only through a suit upon the lines of the one in the New Jersey Chancery could the danger of obstruction be averted and the estate be kept intact until the entry of a decree adjudging the guilt or innocence of the putative conspirators. Whether they are innocent or guilty is a question not before us now. The data for the formation of any opinion on the subject have not yet been supplied. At present our inquiry halts with the discovery of probable cause for preserving the estate from dismemberment or waste through a precipitate decision. If such cause has been made out, we think the court of bankruptcy has been armed with abundant power to preserve the *status quo* until there can be an adequate trial with all the necessary parties and a judgment on the merits.

The Judicial Code provides (§ 262; 28 U. S. C. § 377) that the United States courts "shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law." The Bankruptcy Act reinforces that authority by providing (§ 2 (15); 11 U. S. C. § 11 (15)) that courts of bankruptcy are invested with jurisdiction "at law and in equity" to "make such orders, issue such process and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this title." Referring to these statutes, this court has said that "the power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is . . . inherent in a court of bankruptcy, as it is in a duly established court of equity." *Continental Bank* v. *Rock Island Ry.*, 294 U. S. 648, 675. Cf. *Local Loan Co.* v. *Hunt*, 292 U. S. 234, 240, 241; *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 229; *Looney* v. *Eastern Texas R. R. Co.*, 247 U. S. 214, 221. Jurisdiction to administer the estate draws to itself, when once it has attached, an incidental or ancillary jurisdiction to give protection to the estate against waste or disintegration while frauds upon its integrity are in process of discovery. This power so obviously necessary to the attainment of the ends of justice has been exercised by the lower federal courts in a great variety of circumstances. There have been orders directing payment of moneys into the registry of the court until a plenary suit can be brought to recover them (*In re Mitchell*, 278 Fed. 707), restraining an adverse claim-

ant from disposing of property in advance of a decree (*In re Morris*, 177 Fed. 598; *Pyle* v. *Texas Transport & Terminal Co.*, 185 Fed. 309), and enjoining possessory actions that might jeopardize relief in equity. *In re Republic Plumbing Supply Co.*, 295 Fed. 573; cf. *Blake* v. *Nesbet*, 144 Fed. 279; *In re Blake*, 171 Fed. 298; *In re Nathan Turim, Inc.*, 55 F. (2d) 672. If suits can be enjoined when they are found to have a tendency to embarrass administration, *a fortiori* this may be done when there is a basis for the fear that they will be used as instruments or devices to render fraud triumphant. Not improbably the order in this case might better have imposed a condition that a plenary suit must be brought wthin a reasonable time. This defect, if it be one, is now of no importance, for by concession such a suit was brought within a week. There will be no occasion for delay if the corporation, the bankrupt and his family will coöperate in working for a quick decision. In such circumstances there can be no wrong or prejudice to All Continent by postponing its suit in Pennsylvania to a more comprehensive and efficient remedy that will put conflicting claims at rest. Cf. *Wehrman* v. *Conklin*, 155 U. S. 314, 329. Delay and expedition will be subject to the control of equity. "In that predicament the malleable processes of courts of bankruptcy give assurance of a remedy that can be moulded and adapted to the needs of the occasion." *Brown* v. *O'Keefe*, March 29, 1937, — U. S. —.

Much of the argument for the respondent has been directed to a showing that the suit in Pennsylvania is not subject to restraint for defect of jurisdiction, and this for the reason that the *res* to be affected—the securities held by Sparks & Co. in their office in Philadelphia—had not come within the actual or constructive possession of the court of bankruptcy in New Jersey when the suit was begun to remove the cloud upon title. Cf. *Fort Dearborn Trust & Savings Bank* v. *Smalley*, 298 Fed. 45; *Molina* v. *Murphy*, 71 F. (2d) 605; *In re Adolf Gobel, Inc.*, 80 F. (2d) 849. The argument misconceives the grounds upon which the trustee looks to us for aid. The trustee does not challenge the jurisdiction of the federal court in Pennsylvania, if the word jurisdiction be taken in its strict and proper sense. Cf. *Straton* v. *New*, 283 U. S. 318, 321; *Isaacs* v. *Hobbs Tie & Timber Co.*, 282 U. S. 734, 737, 738. He is not seeking a writ of prohibition directed to the court itself. He is not seeking an injunction to vindicate his exclusive control over a *res*

in his possession, or in the possession, actual or constructive, of the court that appointed him. *Isaacs* v. *Hobbs Tie & Timber Co.*, supra; *Murphy* v. *John Hofman Co.*, 211 U. S. 562, 568, 569; *Moran* v. *Sturges*, 154 U. S. 256, 274. What he seeks is an injunction directed to a suitor, and not to any court, upon the ground that the suitor is misusing a jurisdiction which by hypothesis exists, and converting it by such misuse into an instrument of wrong. *Gage* v. *Riverside Trust Co.*, 86 Fed. 984, 998, 999; *Higgins* v. *California Prune & Apricot Growers*, 282 Fed. 550, 557; *Cole* v. *Cunningham*, 133 U. S. 107, 112, 117, 118. Suits as well as transfers may be the protective coverings of fraud. *Shapiro* v. *Wilgus*, 287 U. S. 348, 335. We are unable to yield assent to the statement of the court below that "the restraint of a proper party is legally tantamount to the restraint of the court itself." The reality of the distinction has illustration in a host of cases. 2 Story, *Eq. Jur.*, 14th ed., § 1195; 5 Pomeroy, *Eq. Jur.*, § 2091; *Cole* v. *Cunningham*, supra; *Traction Co.* v. *Mining Co.*, 196 U. S. 239, 245; *Kessler* v. *Eldred*, 206 U. S. 285; *Rickey Land and Cattle Co.* v. *Miller and Lux*, 218 U. S. 258; *Toledo Co.* v. *Computing Co.*, 261 U. S. 399, 426; *Smith* v. *Apple*, 264 U. S. 274, 279. Cf. Judicial Code, § 265; 28 U. S. C. § 379; *Brown* v. *Pacific Mutual Life Ins. Co.*, 62 F. (2d) 711, 713; *Chicago Title & Trust Co.* v. *Fox Theatres Corp.*, 69 F. (2d) 60, 61, 62.

The decree of the Court of Appeals is reversed and that of the District Court affirmed.

Ordered accordingly.

A true copy.

Test:

Clerk, Supreme Court, U. S.